THE LAW REPORTER.

NOVEMBER, 1842.

RECENT AMERICAN DECISIONS.

Circuit Court of the United States, Rhode Island, September, 1842.
In Bankruptcy.

THEODORE HUTCHINS *v.* GEORGE W. TAYLOR AND ANOTHER.

An assignment, made by debtors, subsequent to the passage of the bankrupt Act, and before it was to go into operation, of all their property, in trust, securing to certain creditors a preference and priority of payment over their general creditors, is of itself an act of bankruptcy, subjecting the debtors to be decreed bankrupts on the petition of creditors.

The clause in the bankrupt Act relative to assignments, &c., made by a debtor after the first day of January, 1841, was designed to give a retrospective effect only as to voluntary bankruptcy.

The meaning of the word "future," in the first clause of the second section of the bankrupt Act, is future, *with reference to the passage of the Act.*

The words "in contemplation of bankruptcy," in the second section of the bankrupt Act mean simply in contemplation of a *state* of bankruptcy, or a known insolvency and inability to carry on business, and a stoppage in business.

THIS case came before the court upon an adjourned question in bankruptcy from the district court of Rhode Island, upon a petition by Theodore Hutchins to have George W. Taylor and Benjamin F. Taylor decreed bankrupts. The act of bankruptcy, alleged to have been committed, was "making a fraudulent conveyance, assignment, sale, and other transfer of their lands, tenements, goods, chattels, and evidences of debt."

Upon the hearing, the district judge ordered that the following

question be adjourned into the circuit court, namely; "whether the assignment of the said George W. Taylor & Co., (a copy of which is herewith presented) being an assignment in trust of all their property, made the eighteenth day of December, A. D. 1841, and securing to certain creditors of the said George W. Taylor & Co., a preference and priority of payment over their general creditors, be such an act of bankruptcy as will authorize the court agreeably to the said petition to declare them bankrupts."

The assignment referred to above was as follows: "Know all men by these presents, that we, George W. Taylor, and Benjamin F. Taylor, both of the city and county of Providence, in the state of Rhode Island, copartners in company, under the name and firm of George W. Taylor & Co., for and in consideration of the trusts hereinafter declared, and of the sum of one dollar to us paid by Amasa Manton, of said city of Providence, the receipt of which said sum is hereby acknowledged, have given, granted, bargained, sold and conveyed, and by these presents do give, grant, bargain, sell and convey unto him, the said Amasa Manton, his heirs and assigns, all and singular the entire stock of goods and stock in trade held by us, whether situate in the store occupied by us, on Weybosset street, or elsewhere in said city of Providence, or wherever else said goods or any portion of them may be situate. Also all and singular the counting room and store furniture, scales, weights, measures and other articles used in said store, or in the prosecution of our business. Also all sums of money due and payable to us by note, book account, or otherwise, together with the books of account and all and every evidence of such indebtedness. And also pew number 84, in Grace church, in said city of Providence. To have and to hold the same with full power and authority to use our names or the names of said firm in the collection or adjustment of said debts, to him the said Amasa Manton, his heirs and assigns; but in trust, nevertheless, to sell and dispose of said personal property, to collect said sums of money, due and payable to us, using a reasonable discretion as to the times and modes of selling and disposing of said property as it respects making sales for cash or on credit at public auction, or private sale, and with the right to compound or compromise with any person or persons indebted to us for the said sum or sums of money due and payable from such person or persons to us, taking a part for the whole wherever the said trustee shall deem it expedient to do so, and then in trust to dispose of the proceeds of such sales and of such collections in manner following, to wit: *First.* To the payment of all the expenses attending the drawing and execution of this deed, the execution of the trusts herein contained, and a reasonable compensation to said trustee for his services. *Second.* To the payment of all notes, drafts, or checks, made and executed by us, which have been indorsed, guaranteed, or the payment thereof otherwise secured by the aforementioned Amasa Manton, or by the firm of Manton & Hal-

lett, at our request, or for our accommodation; all notes, drafts, or checks, made and executed by any other person or persons which have been indorsed, guaranteed, or the payment thereof otherwise secured by the aforementioned Amasa Manton, or by the firm of Manton & Hallett at our request and for our accommodation." [Several other liabilities are then enumerated under this class, and then it is provided, that] "after payment of all the debts and expenses hereinbefore mentioned, the balance of said proceeds, or so much thereof as may be necessary for that purpose, shall be appropriated to the proportional payment of all other debts due from us the said George W. Taylor & Co.: Provided, that no payment shall be made to any creditor, other than those named in the preceding classes, who shall not agree to accept his proportional part in full discharge of his debt, and execute a release of all his claims upon us the said George W. Taylor & Co., within four months from the date of this deed; and the proportion or dividend of any creditor refusing or neglecting to execute such release, shall be paid to us the said George W. Taylor & Co. In testimony whereof, we have hereunto set our hands and seals at said Providence, this 18th day of December, 1841."

Another deed of assignment of the same date from Benjamin F. Taylor to Amasa Manton, conveyed certain property in trust, (1.) To pay the expenses of the assignment. (2.) To the payment of all sums due from the assignor individually and not as a copartner with any other person. (3.) To apply the residue to the trusts specified in the other deed of trust.

The argument of the question was postponed at the request of counsel, at the last June term of the circuit court. It was afterwards argued by *Whipple & Rivers*, and *Hazard & Jencks*, for the petitioner, and by *Richard W. Greene* and *James M. Clarke*, for George W. Taylor & Co.

STORY J. This case has, from accidental circumstances, remained for consideration a longer period than has been usual in bankruptcy. The arguments have been very elaborate, and have exhausted the subject. The case, however, after all, lies within a narrow compass; and mainly turns upon the true construction of the second section of the bankrupt act of 1841, ch. 9. That section declares, that "all future payments, securities, conveyances, or transfers of property, or agreements, made or given by any bankrupt, in contemplation of bankruptcy, and for the purpose of giving any creditor, indorser, surety, or other person any preference or priority over the other creditors, and all other payments, securities, conveyances, or transfers of property, or agreements made or given by such bankrupt, in contemplation of bankruptcy, to any person or persons whatever, not being a bonâ fide creditor or purchaser for a valuable consideration, without notice, shall be deemed utterly void, and a fraud upon this act." The section further provides, that "in case it shall be made to

appear to the court, in the course of proceedings in bankruptcy, that the bankrupt, *his application being voluntary*, has subsequent to the first day of January last, or *at any other time*, in contemplation of the passage of a bankrupt law, by assignment, or otherwise, given, or secured any preference to one creditor over another, he shall not receive a discharge unless the same be assented to by a majority in interest of those of his creditors who have not been so preferred." The seventeenth section of the act declares, that this act shall "take effect from and after the first day of February next." The act passed and was approved on the nineteenth day of August, 1841. Now, the question adjourned by the district court, is, whether the assignment of Taylor & Co., (stated in the case) being an assignment in trust of all their property, made on the eighteenth of December, 1841, (some months after the passage of the act, but before it was to go into operation,) securing to certain creditors of Taylor & Co., a preference and priority of payment over their general creditors, be an act of bankruptcy within the first section of the act, which declares, that whenever any person being a merchant, &c., shall among other things, "make any fraudulent conveyance, assignment, sale, gift, or other transfer of his lands, tenements, goods or chattels, credits, or evidences of debt, &c.," he may, upon petition of any one or more of his creditors, &c., be declared a bankrupt.

Now, under the English bankrupt laws, it has been settled, for at least three quarters of a century, that an assignment of the nature stated, made by any person within the scope of the bankrupt laws, is a fraud upon those laws, and of itself an act of bankruptcy. The cases cited at the bar, are conclusive as authorities upon this point; and put it upon the ground, that it is against the whole policy and objects of those laws, and must supersede their operation.[1] Our bankrupt act of 1841, ch. 9, § 2, and § 4, demonstrates, that congress had an earnest intention to prevent all preferences and priorities in favor of particular creditors, and to secure the assets of all persons, falling within the purview of the act, for distribution equally among all their creditors *pro ratâ*. This is the main scope, and object and policy of the act. It would, therefore, be a matter of surprise, if the act had permitted preferences and priorities to particular creditors, going even to the extent of sweeping away all the property of the debtor, to the exclusion of his general creditors, in cases like the present case, without rebuke or prohibition.

The whole question, therefore, turns upon the language of the two

---

[1] See *Linton* v. *Bartlet*, (3 Wils. R. 47); *Butcher* v. *Easto*, (1 Doug. R. 294); *Eckhardt* v. *Wilson*, (8 Term R. 140); *Ex parte Bourne*, (16 Ves. 145); *Worsley* v. *DeMattos*, (1 Burr. R. 467, 477); *Wilson* v. *Day*, (2 Burr. R. 827); *Alderson* v. *Temple*, (4 Burr. R. 22. 39); *Harman* v. *Fisher*, (Cowp. 117, 123); *Rush* v. *Cooper*, (Cowp. R. 629, 633); *Tappenden* v. *Burgess*, (4 East's R. 230); *Newton* v. *Chantler*, (7 East's R. 138, 143.)

first clauses of the act. The first declares all *future* payments, securities, conveyances, or transfers of property, made in contemplation of bankruptcy, and to give a preference or priority to particular creditors, void, and a fraud upon the act. The second, declares all *other* payments, securities, conveyances, or transfers of property, void, that is, all such payments, securities, conveyances, or transfers, made, &c., in contemplation of bankruptcy, but without any such intention of preference or priority to any creditor or purchaser, with notice, void, and a fraud upon the act. So that it is perfectly manifest, that when a person, within the purview of the act of 1841, makes any such payment, security, conveyance, or transfer of property, in contemplation of bankruptcy, it is a fraud upon the act, and void, if it is designed to give such a preference or priority; or if not so designed, if the creditor or purchaser has notice, that the debtor contemplates bankruptcy. In each case, however, the payment, security, conveyance, or transfer, must be after, and not before the passage of the act. For the other clause of the section relative to assignments, &c., made by a debtor after the first day of January last, that is, after the first day of January, 1841, uses expressions, which plainly show, that it was designed to give a retrospective effect only as to voluntary bankrupts, and not to involuntary bankrupts. And the rule here, is, *Exceptio probat regulum.* Besides; the universal construction of statutes is, that they are prospective and not retrospective, unless the language absolutely requires such an interpretation. *Lex dat formam futuris non preteritis negotiis.*

What, then, is meant by *future* in the first clause of the second section of the act? Does it mean *future* to the passage of the act, or future to the first day of February, 1842, when the act was to take effect? My judgment is, that it means *future* with reference to the passage of the act. The argument against this construction appears to me not well founded in general principles of construction; and it is incompatible with the obvious objects and purposes of the act. Such a construction of the words of every act ought to be made, if consistent with its terms, as shall give full effect to its objects and policy, and not defeat them. *Ut res magis valeat, quam pereat.* Now, there is no ground to say, that the word "future" may not in this connection apply reasonably and sensibly, and according to the ordinary proprieties of language, as well of legal interpretation, to the passage of the act. It is not a well founded argument to assert, that the act was no act until the first day of February, 1842. It was an act, and became a law by the very terms of the constitution of the United States, as soon as it was approved by the president, although its operation was suspended until the first day of February, 1842. It is the time of approval, which makes it a law; and if not a law at that time, it never can be one; for the president has no authority to approve what shall be a law only at a distant period. He may then be dead, or have a successor in office. He approves *in presenti*, and every act

of congress, upon such approval, becomes a present law. That law may be carried into effect *in presenti*, or in future, as its own terms justify or require.

But if this were not the natural or necessary interpretation of the language of statutes generally, no one can doubt, that it is competent for congress to provide, that particular provisions shall be in force or efficiency from the passage of any act, if such is its pleasure, although the general operation of the act is suspended until a future time. The very clause of this section, respecting assignments made since the first day of January, 1841, (long before the passage of this act,) demonstrates this; and no one can deny, that it must, from the passage of the act, be deemed to have possessed and retained its full potency, and virtue, and designed operation. It is true, that if the bankrupt act of 1841 had never gone into operation, there could have been no such proceeding as that of the present petitioner against Taylor & Co., *in invitum*, to be declared bankrupts. But it is equally true, that having gone into operation, all its provisions are to be deemed to be equally in force, and to have due effect, according to the language and intent of the act. Now, to me, at least, it seems impracticable, consistently with the known objects and policy of the act, to give any other interpretation to the word "future," in the connection, in which it stands, than that it means "future" to the passage of the act, not "future" to the act's going into operation. If the latter had been the intent of congress, similar language would have been used to that used in the bankrupt act of the fifth of April, 1800, ch. 19, § 1, addressed to the same subject, of fraudulent conveyances; where it is said, "that from and after the first day of June next, if any merchant," &c., "shall make, or cause to be made, any fraudulent conveyance," &c.[1] So, here, the language in the bankrupt act of 1841, could have been, not "future," generally, but, "from and after the first day of February next," or, "from and after this act shall take effect," all payments, securities, conveyances, or transfers, &c., made in contemplation of bankruptcy, &c., shall be deemed utterly void, and a fraud upon this act. What would be the effect of giving to the bankrupt act of 1841, the construction contended for by the respondents' counsel? It would be to enable every debtor, at any time, between the nineteenth of August, 1841, and the first of February, 1842, in contemplation of bankruptcy, to make all such payments, securities, conveyances, or transfers, which he might choose, giving preferences and priorities, which the very act would treat as a fraud, and thus enable him to strip himself of every dollar of his property, in favor of his preferred creditors, and leave all the rest of his creditors without any payment or dividend. Now, if the act imperatively required such an interpretation, I agree, that the court

---

[1] See *Wood* v. *Owings*, (1 Cranch R. 239.)

would be bound to follow it. But if another interpretation, equally consistent with the words of the act, carrying into full effect all the objects and policy of the act is presented, and makes the whole system harmonize for the same uniform purpose, and avoids the very mischiefs, which have been stated, it seems to me, that it is the duty of the court to obey and follow it. So far from the case of *Wood* v. *Owings*, (1 Cranch R. 239,) shaking this interpretation, it rather aids and strengthens it; for the court put the case expressly upon the ground, that the words of the act required, that the fraudulent conveyance should be made *after* the first of June, and not *before*.

The words "in contemplation of bankruptcy," used in the second section of the bankrupt act of 1841, do not mean in contemplation of committing an act of bankruptcy, within the bankrupt act, or in contemplation of taking the benefit of that act; but simply in contemplation of a *state* of bankruptcy, or a known insolvency and inability to carry on business, and a stoppage of business. It is the old meaning of the term bankrupt, when a man being insolvent, his bank or counter of business is broken up.[1] But I have had occasion in another case to examine this matter; and therefore do not here dwell upon it. No one can reasonably doubt that the assignment in the case at bar was in contemplation of bankruptcy in the sense above stated. See the next case of *Arnold* v. *Maynard*, p. 296.

It does not appear to me, that any thing in the first section of the act controls this interpretation. That section declares, who shall be the persons, who are within the provisions of the act, and the circumstances, under which they may proceed or be proceeded against under the act. I agree, that all its provisions, as to voluntary and involuntary bankrupts, are prospective; that is, the parties and the facts must exist, and fall within the predicaments pointed out after the passage of the act. But it by no means thence follows, that if the parties are in such predicaments at and after the passage of the act, and they afterwards do any of the things contemplated by the act, before the act take effect, or goes into operation, that, when it does go into operation, all the provisions of the act do not attach to and govern their own rights and the rights of the creditors. The act may well say, you must not in the intermediate time between the passage of the act and its going into operation, do such and such things, which are deemed a fraud upon this act; and if you do, you shall be liable, when the act goes into operation, to be thereafter and thereupon declared a bankrupt. That would at once be reasonable, and just, and appropriate. It would be a question not of *time*, but of *case*; not of whether you are liable to be declared a bankrupt; but when you may be declared so. In my judgment, this is the very intendment of the act, as to the case in judgment.

---

[1] See 2 Black. Comm. 471, note.

I shall send a certificate to the district court accordingly.
The certificate was as follows :

Circuit Court of the United States, Rhode Island, September, 1842. *In the matter of Theodore Hutchinson, petitioner*, v. *George W. Taylor, and another, in bankruptcy.* It is ordered by this court, that the following answer be sent to the district court upon the question adjourned by that court into this court, namely. It is the opinion of this court, that the assignment of the said George W. Taylor & Co., referred to in the question, being an assignment in trust, of all their property, made on the eighteenth day of December, A. D. 1841, and securing to certain creditors of the said George W. Taylor & Co., a preference and priority over their general creditors, is an act of bankruptcy within the true intent and meaning of the bankrupt act of 1841, chapter 9, and as such, will authorize the district court, agreeably to the prayer of the petition of the said Theodore Hutchins, to declare them bankrupts.

JOSEPH STORY,
One of the Justices of the Supreme Court of the United States.

Circuit Court of the United States, Massachusetts, September, 1842, *at Boston. In Bankruptcy.*

CHARLES ARNOLD AND OTHERS *v.* CHARLES MAYNARD.

Where a trader gives a mortgage to one of his creditors, in contemplation of bankruptcy, and for the purpose of giving such creditor a preference over the others, it is an act of bankruptcy within the meaning of the statute.

Where the bankrupt Act speaks of a conveyance or transfer by a debtor "in contemplation of bankruptcy," it does not necessarily mean, in contemplation of his being declared a bankrupt under the statute, but in contemplation of actually stopping his business, because he is insolvent, and utterly incapable of carrying it on.

Where a retailer of merchandise mortgaged his whole stock in trade, of the nominal value of four or five thousand dollars, and comprising the whole mass of his visible property, to a creditor, to secure to him the sum of about seventeen hundred dollars, and against a liability for about five hundred dollars, the debtor owing debts to the amount of five thousand dollars, then over due, and the whole amount arising from a sale of his goods at auction, being less than five thousand dollars; it was *held*, that the debtor must be taken in law, to have known, that he was, at the time of making the mortgage, insolvent, and must stop and break up his business, and that he executed the mortgage in order to give the mortgagee a preference or priority over the rest of his creditors, in contemplation of thus stopping and breaking up his business, and thus being in a *state* of bankruptcy.

Such a mortgage may subject the debtor to be proceeded against as an involuntary bankrupt, notwithstanding he did not, at the time of making it, intend to apply for the benefit of the bankrupt law, or to make himself liable to be proceeded against *in invitum*.

Nor does it make any difference as to the character of the act, whether the mortgage was voluntary and spontaneous on the part of the mortgagor, or was given upon

the request or demand of the mortgagee, or upon a verbal promise made in general terms when the debt was contracted, to give security upon request, if at the time of giving the mortgage, the mortgagor knew that he was insolvent, and must stop his business, and intended by such mortgage to give a preference or priority to the mortgagee over the rest of his creditors in contemplation of such stoppage of business and state of bankruptcy.

THIS was the case of a petition by Charles Arnold, Henry Adams, and Joseph C. Hicks, of Boston, praying that Charles Maynard, of Lowell, might be declared a bankrupt. The petition set forth that the said Maynard, on the fifth of April, 1842, made a fraudulent mortgage to John L. Perry, his former partner, conveying all his stock in trade, the same being all his visible property, to secure a debt amounting to $2200,00. That the said Maynard, on the tenth May, following, made a certain other fraudulent mortgage to one Burton, of all his stock in trade, to secure a debt amounting to $850,00; that he then falsely confessed as due to the said Burton, the sum of $500; and the said Burton afterwards took possession of the said property under the said mortgage, wherefore the petitioners prayed that the said Maynard might be declared a bankrupt, within the provisions of the act of congress, in such case made and provided.

When this petition came before the district court, the following questions were ordered to be adjourned into this court for a final determination, namely: —

First. Whether, if a retailer of merchandise, on the 25th day of April last, mortgaged his whole stock in trade, consisting of goods to the nominal amount of from four to five thousand dollars, and comprising his whole property, excepting debts due to him to the amount of about two hundred dollars, to a creditor, to secure him the sum of about seventeen hundred dollars, and against a liability of about five hundred dollars, he, the debtor, owing debts to the amount of five thousand dollars, all then over due, and the cash value of all his goods, if sold at auction, not exceeding twenty-three hundred to four thousand dollars, it is an act of bankruptcy within the meaning of the statute?

Second. Whether, if a retailer of merchandise, knowing himself to be insolvent, makes such mortgage, without intending to apply for the benefit of the bankrupt law, or to make himself liable to be proceeded against *in invitum*, it is a security, conveyance, or transfer of property, made or given in contemplation of bankruptcy, within the meaning of the act?

Third. Whether, if such mortgage be made upon request, or demand of the creditor, and upon a verbal promise made in general terms, when the debt was contracted, to give security upon request; and without any spontaneous act on the part of the debtor, to induce such request, it is a security, conveyance, or transfer, for the purpose of giving the creditor any preference or priority over his general creditors, within the meaning of the statute?

Fourth. Whether, if such mortgage be made in contemplation of

bankruptcy, and for the purpose of giving such preference, it is an act of bankruptcy within the meaning of the statute?

The cause was argued upon the adjourned question by *Butler*, of Lowell, for the petitioners, and by *Parker*, of Lowell, for the respondent, Maynard.

STORY J. This is the case of a petition by certain creditors of Charles Maynard, proceeding *in invitum*, to have him declared a bankrupt under the bankrupt act of 1841, ch. 9.

There are four questions adjourned into this court for consideration and decision. The questions arise under that clause of the first section of the bankrupt act, which declares, that if any person being indebted to a certain amount, and being a merchant or a retailer of merchandise, &c., &c., shall "make any fraudulent conveyance, assignment, sale, gift, or other transfer of his lands, tenements, goods, or chattels, credits, or evidences of debt," he may, upon petition of his creditors, be declared a bankrupt. All the questions turn upon this, whether the mortgage and conveyance stated in these questions, is to be deemed, under the circumstances therein stated, to be a fraudulent mortgage or conveyance, in the sense of the clause. Fraud, in any conveyance, is, and rarely can be, a mere matter of law; but, for the most part, it is a matter of fact, dependent upon the intent of the parties. But when all the facts and circumstances are ascertained, it may, and, indeed, often does, resolve itself into a mere question of law, as to the intent fairly deducible from those facts and circumstances. There is not the slightest doubt in my mind, that, if the mortgage in the present case was made in contemplation of bankruptcy, and for the purpose of giving a preference to the mortgagee over the other creditors of the mortgager, it would be an act of bankruptcy within the clause of the bankrupt act already referred to. Indeed, such a case, falls directly within the second section of the Act, which, among other things, declares, That all "securities, conveyances, or transfers of property, &c., made or given by any bankrupt in contemplation of bankruptcy, and for the purpose of giving any creditor, &c., &c., any preference or priority over the general creditors of such bankrupt, &c., shall be deemed utterly void, and a fraud upon this act." So that the fourth question must be answered in the affirmative, upon the very language of the Act, as the mortgage under the circumstances stated in the question, was a "fraud upon the Act."

The first question contains, what I suppose are the real merits of this case. And for the purpose of answering it, I must assume, that the retailer was conscious of his own insolvency, and of his utter inability to pay all his creditors, or to carry on his business any longer, and designed to give the mortgagee a preference and priority over all his other creditors by the mortgage. Now, under such circumstances, I must presume, that in point of law, he knew the natural consequences of such an act, and that he must thereby contemplate his own imme-

diate bankruptcy, that is, his utter inability to pay his debts, and to proceed in business, and his own right to petition for the benefit of the bankrupt act of 1841, and his liability to be proceeded against at his own choice, as well as his liability to be proceeded against by his creditors *in invitum*, in bankruptcy, at their election, for such act, if it was intended to give a preference to the mortgagee over all his other creditors, as being against the provisions and policy of the Act. In this view of the matter, and upon the facts stated, I should answer the first question in the affirmative, and say, that the mortgage so given, was an act of bankruptcy within the meaning of the statute.

The second question involves more difficulty in being answered in direct terms, because it states, what I apprehend cannot in point of law be stated, that is, that a man does not intend and contemplate precisely what the law pronounces the necessary result of his acts. No man can be permitted to aver his ignorance of the law as a qualification of his acts. On the contrary, every man is presumed to know the law, and he is bound to know, what are the legal results of his acts; or, as lord Ellenborough said in *Newton* v. *Chantler*, (7 East R. 143,) every man must be taken to contemplate the ordinary consequences of his own act at the time of the act done. *Ignorantia legis neminem excusat*, is a maxim laid up among the earliest rudiments of the law. If the question meant to be asked, was, whether, if the mortgagor, at the time of executing the mortgage, knowing his own insolvency, and inability further to carry on his business, but having no immediate intention on his own part, to seek by petition the benefit of the bankrupt act, or thereby to enable his other creditors to proceed against him *in invitum*, to have him declared a bankrupt under that act, but actually designing and intending thereby to give a preference to the mortgagee over all his other creditors, it was such a security, conveyance, or transfer as was fraudulent, and in contemplation of bankruptcy within the meaning of the bankrupt act, then I say, that his mere private intention cannot overcome the legal intention and purport of the act; and it is to be treated, in the sense of the statute, as made in contemplation of bankruptcy, although it was not done by him with the intention to be declared a bankrupt. When the statute speaks of a conveyance or transfer in contemplation of bankruptcy, it does not necessarily mean, in contemplation of being declared a bankrupt under the statute; but in contemplation of actually stopping his business, because he is insolvent and utterly incapable of carrying it on. And this certainly was the primary sense, in which the language was used and understood in the English bankrupt laws, from which it has been borrowed and incorporated into our statute, whatever may have been the more modern construction put upon it. The very word bankrupt, supposes a man to be broken up in his business, and insolvent, or as Mr. Justice Blackstone (2 Black. Comm. 472, note,) puts it, the word is derived from *bancus*, or *banque*, which signifies the table or counter of a tradesman, and *rup-*

tus, broken, denoting thereby one, whose shop or place of trade is broken and gone. Now, when a man, being about to fail, and to stop all his business, with a perfect consciousness, that he is insolvent, and with the intention to break up all his business, makes a conveyance to a particular creditor, with a view to give him a preference over all his other creditors, of the whole, or of the mass of his visible property, we must understand, that he does the act with a design to evade the provisions of the bankrupt act, which provide for an equal distribution of his property among all his creditors. If such a conveyance should be held valid, what is there to prevent the party at a future time, at his leisure, or his pleasure, from applying for the benefit of the Act? If the present mortgage should be held valid, what is there to prevent Maynard from now applying for the benefit of the bankrupt act, since he might say, that at the time, when he gave the mortgage, he had no fixed intention of that sort, and did not make it in contemplation of then taking the benefit of the Act?

I agree, that the mere fact of a man's being insolvent, and knowing the fact, does not necessarily establish, that he means to stop business and break up his establishment; for he may hope and believe, that he can still carry it on, and perhaps redeem himself from insolvency. But when he is deeply in debt, and intending to fail, and break up his whole business at once, he makes a conveyance to a particular creditor, to give him a preference over all the rest, it seems to me irresistible evidence, that he does the act in contemplation of bankruptcy. I do not think, that it is necessary, for this purpose that he should contemplate the conveyance, as an act of bankruptcy, or that he should make it with a present and immediate intention to take the benefit of that statute. It is sufficient, that he must know, that in making that conveyance, he defeats the provisions of the statute, and yet that if it be not a fraud upon the Act, he may still at any time, at his pleasure, take the benefit of the Act, and thereby make the preference conclusive and perfect. Now, such a result is manifestly at war with the whole objects of the statute. It would put it in the power of the debtor to avail himself of all the benefits of the Act, and yet would enable him at the same time, upon his own secret and unknown intention — inscrutable to others, and admitting of no possible certainty — to do the very acts, which the statute was designed to prevent.

I do not think, that the English decisions upon this subject can have any very direct application to govern the construction of our statute. Their bankrupt acts apply, for the most part, to cases of involuntary bankrupts; whereas the main purposes of ours are for the benefit of voluntary bankrupts. But the cases of *Flook* v. *Jones*, (4 Bing. R. 20,) and *Poland* v. *Glyn*, (4 Bing. R. 22, note,) and *Ridley* v. *Gyde*, (9 Bing. R. 349,) proceed upon principles quite analogous. I am aware, that the authority of some of these cases, so far as they apply to the English bankrupt laws, has been questioned; that they have been thought to go too far; and that they did not meet

the approbation of the court in *Morgan* v. *Brundrett*, (5 Barn. and Adolph. R. 289.) But this last case, as well as the other cases, shows, that the words "in contemplation of bankruptcy," are not necessarily limited to acts done, which would, *per se*, be acts, for which the party might, or would be declared a bankrupt under the bankrupt laws; but which must and would produce on his part, a positive state of bankruptcy, in which he might become a proper subject of the bankrupt laws. Mr. Justice Parke, in this case said; "The meaning of these words, 'in contemplation of bankruptcy,' I take to be, that the payment or delivery must be with intent to defeat the general distribution of effects, which takes place under a commission of bankrupt." Mr. Justice Patteson said; "The recent cases have gone too great a length; they seem to have proceeded on the principle, that if a party be insolvent at the time, when he makes a payment or a delivery, and afterwards becomes bankrupt, he must be deemed to have contemplated bankruptcy at the time when he made the payment. But I think, that is not correct; for a man may be insolvent, and yet not contemplate bankruptcy." Lord Chief Justice Gibbs, in the case of *Fidgeon* v. *Sharpe*, (5 Taunt. 539–541,) was still more expressive. "With respect," (said he) "to this doctrine of contemplation in cases of bankruptcy, we have nothing either in the common or statute law, to show what it is. The cases, in which this doctrine was introduced, make it depend upon the *quo animo:* if a trader thought he should not ultimately have enough to pay all his creditors, it must be presumed, that if he gives full payment to one, he does it in contemplation of bankruptcy. But if a man, honestly believing he shall have enough ultimately to pay all, but having bought goods with intent to apply them to the particular purposes of his trade, and finding, that it is necessary, that he should discontinue his trade, and therefore cannot make the intended use of the goods, thinks it fair and right to return the goods to the person of whom he purchased them, I cannot say, that this is done with a view or contemplation of bankruptcy." The case of *Palling* v. *Tucker*, (4 Barn. and Ald. 382,) is very strong to the purpose of showing that a voluntary conveyance to one creditor, with the design to give him a preference, to the prejudice of the rest of the creditors, is a fraud upon the bankrupt laws, and an act of bankruptcy. The same doctrine was held in *Newton* v. *Chantler*, (7 East R. 137, 143, 144.) In *Wedge* v. *Newlyn*, (4 Barn. and Adolph. 831,) it was expressly held, that a trader conveying away property to a creditor, to such an extent as will prevent him from continuing his business, and render him insolvent, commits thereby an act of bankruptcy.[1] Indeed, I should deduce the general conclusion

[1] See also *Newton* v. *Chantler*, (7 East R. 145); per Le Blanc J. *Compton* v. *Bedford*, (1 W. Black. R. 362); *Carr* v. *Burdiss*, (1 Cromp. Mees. and Rose 447, S. C. 8 Tyrwhitt R. 136); per Parke, Baron. *Baxter* v. *Pritchard*, (1 Adolp. and Ellis, 456); *Abbott* v. *Burbage*, (2 Bing. New Cases, 444.)

from the English cases to be, that a conveyance by a person, knowing himself to be insolvent, to one creditor, with a design of giving him a preference over the other creditors, in the event of his own expected bankruptcy and stoppage of business, was of itself an act of bankruptcy, as a fraud upon the bankrupt laws. But, whether it be so or not under those laws, I think it is the natural, if not the necessary, intention, deducible from the whole structure and policy of the bankrupt act of 1841. With this explanation, I should answer the second question also in the affirmative.

As to the third question, whatever may be the case under the peculiar provisions of the bankrupt laws of England, it appears to me, that it ought to be answered in the affirmative, under our bankrupt act of 1841. The previous request or demand of the creditor, or the verbal promise of the debtor, when he contracted the debt, to give security upon request, does not make; and ought not to make any difference as to the rights of the other creditors. Whether the mortgage is spontaneous on the part of the debtor, or requested by the creditor; still, if each knows, that the debtor is insolvent, and that he contemplates immediate bankruptcy, and breaking up of his business, and the object of the mortgage is to secure a preference to that creditor over the other creditors, I think, that it is a fraud upon the bankrupt act of 1841, and is therefore an act of bankruptcy within the meaning of the statute.

I shall direct a certificate accordingly to be sent to the district court.

The certificate was as follows.

Circuit Court of the United States, Boston. In Bankruptcy. In the matter of Charles Arnold and others v. *Charles Maynard.* It is ordered by this court, that the following certificate be sent to the district court, in answer to the questions adjourned by the said court into this court, in this case.

1. The first question is answered by this court in the affimative, it being the opinion of this court, that upon the facts stated, the retailer, who made the mortgage to the creditor, the mortgagee, in the case, must be taken to have known, that he was at the time of making the mortgage, insolvent, and must stop and break up his business; and that he executed that mortgage in order to give the mortgagee a preference or priority over the rest of his creditors, in contemplation of thus stopping and breaking up his business, and thus being in a *state* of bankruptcy.

2. The second question is also answered in the affirmative, it not being essential in the opinion of this court, that the retailer should contemplate or intend, at the time of making the mortgage, to apply for the benefit of the bankrupt act of 1841, or thereby to subject himself to be proceeded against by his creditors as an involuntary bankrupt, under the bankrupt act of 1841. But that it is sufficient

to make the mortgage so given, a security, conveyance, and transfer, in contemplation of bankruptcy, within the meaning of the bankrupt act, that he should at the time, know himself to be insolvent, and unable farther to carry on his business, and that he contemplated a stoppage and breaking up of his business, and intended by such mortgage to give a preference or priority to the mortgagee over the rest of his creditors, in contemplation of such stoppage of business, and state of bankruptcy.

3. The third question is also answered by this court in the affirmative, this court being of opinion, that, under the bankrupt act of 1841, it is wholly immaterial, whether the mortgage was voluntary and spontaneous on the part of the mortgagor, or was given upon the request or demand of the mortgagee, or upon a verbal promise made in general terms, when the debt was contracted, to give security upon request, if at the time of giving the mortgage, the mortgagor knew that he was insolvent, and could not farther continue his business, but must stop the same, and he intended by such mortgage to give a preference or priority to the mortgagee over the rest of his creditors, in contemplation of such stoppage of business and *state* of bankruptcy.

4. The fourth question is answered in the affirmative, as being clearly an act of bankruptcy within the meaning of the bankrupt act of 1841.

JOSEPH STORY,
One of the Justices of the Supreme Court of the United States.

IN THE MATTER OF BENJAMIN B. GRANT AND OTHERS.

A creditor of a bankrupt, who holds collateral security for his debt, may, in the discretion of the district court, be permitted to take such collateral security at its value, to be ascertained under the direction of the court, and prove his debt for the residue.

Or the district court may order such security to be sold, or may ascertain its value by an appraisement, or in any other mode satisfactory to the court, or may allow the creditor to take it at its full nominal value.

The circuit court has no authority to entertain questions in bankruptcy, adjourned from the district court, unless they are distinctly raised.

THIS case came up before the district court, upon the report of a commissioner (William Gray) preparatory to a dividend, in which several questions were raised for the decision of the court. It appeared, that the American Bank held certain collateral securities, which the corporation desired to assume at their actual value, deducting the amount from their claim. At the coming in of the report, the district judge made an order, "that the questions submitted by the commissioner in the accompanying report, and also the questions, whether a creditor of a bankrupt who holds collateral security for his debt, may be permitted to take such collateral at its value, to

be ascertained under the direction of the court, and prove his debt for the residue; or whether such collateral shall be sold for the benefit of the creditor, and he be permitted to prove for the residue, or in what manner such collateral shall be disposed of and to what extent such creditor shall be allowed to prove his debt, be adjourned into the circuit court, to be there heard and determined."

The questions were argued by *Parsons* and *P. W. Chandler*, for the American Bank. No opposition was made on the other side.

Story J. The two questions, adjourned into this court, involve alternative views, and, therefore, may be conveniently considered together. The real point in both of them is, what is to be done in cases, where a creditor, who proves a debt, holds collateral securities therefor. Are those securities in all cases to be sold and the creditor to be permitted to prove for the residue of his debt? Or may the creditor under the direction and sanction of the court, be permitted to take the securities at their true value, that value being ascertained under the direction of the court; and to prove for the residue of his debt?

Upon these questions, I do not profess to feel any real difficulty. The whole proceedings in bankruptcy are on the equity side of the court; and whatever a court of equity might do in the exercise of its general jurisdiction over subjects, requiring a like interposition, may properly be done by the district court, in cases of bankruptcy.

There can be no doubt, that a creditor, holding securities, is enabled to prove his debt upon his offer to surrender and actually surrendering those securities, to be disposed of according to the order and direction of the court, and that he is entitled to prove his debt, deducting the true value of the securities therefrom, that true value when ascertained, being paid or applied by the court for the exclusive benefit of such creditor. How, then, is such value to be ascertained by the court? Must it be ascertained by a sale of the securities by the court in all cases? Or may it be ascertained by an appraisement, or by allowing the creditor to take the same at the nominal value, or in any other manner, which the court may deem for the true interest, and benefit of all concerned in the estate, if there is no objection by the bankrupt, or any of the other creditors, or other party in interest; — or in case of objections, if upon full notice and hearing of all parties, the court in the exercise of a sound discretion, deem the one or the other course most for the benefit of all concerned in the estate?

My judgment is, that the whole is a matter resting in the sound discretion of the court, upon all the circumstances of each particular case. The court have full authority to ascertain the true value by a sale, or by an appraisement, or in any other mode, which it shall deem best for the interest of all concerned in the estate; or it may allow the creditor to take any one or more or all of the securities at their nominal value, if that is ascertained by the court to be the true and highest value of the security.

I am aware, that the usual course in England, under the bankrupt laws, is for the court to direct a sale of the collateral securities. So it will be found laid down by Mr. Eden, and Mr. Deacon, in their treatises on the bankrupt laws.[1] But this, as I apprehend, is a matter in the mere discretion of the court, and is resorted to as generally the most safe, convenient, and satisfactory mode of ascertaining the true value. But it is by no means the only mode, which the court is authorized to resort to, in the exercise of its discretion. On the contrary, cases may, and indeed, do often occur, in which the resort to a sale would be injurious to the interests of all concerned in the estate, as tending to unnecessary delays and expenses. Suppose, for example, a creditor holds negotiable paper alone as security, and he is ready and willing to take that paper, because he has confidence that the parties thereto are solvent, at its full nominal value. Surely it would be absurd to say, that nevertheless he should not be at liberty to take it, but it should be sold at auction, where it might possibly bring a less price, and at all events load the security with expenses to be deducted from its value.

But if there were any practical difficulty in England, under their bankrupt laws, as to the jurisdiction and authority of the court to ascertain the value of collateral securities, otherwise than by a sale, there is not, in my judgment, the least doubt under our bankrupt act of 1841, to maintain the most ample jurisdiction and authority to order either a sale, or an appraisement, or any other satisfactory mode to ascertain the true value of the securities, or to allow the creditor to take them at their true nominal value. I shall direct a certificate to be sent accordingly to the district court.

The argument on behalf of the American Bank, has presented some other points for the consideration of this court, growing out of the report of the Master. But these points are not involved in the questions submitted to this court, and, therefore, I have no authority to entertain them.

The certificate was as follows:

Circuit Court of the United States, Massachusetts District. In Bankruptcy. In the matter of Benjamin B. Grant and others. It is ordered by the court, that the following answers be certified to the district court, upon the questions adjourned into this court, upon the petition of the American Bank, to be heard and determined. *First*, that a creditor of a bankrupt, who holds collateral security for his debt, may be permitted to take such collateral security at its value, to be ascertained under the direction of the district court, and prove his debt for the residue, if in the exercise of the discretion of

---

[1] Eden bankrupt laws, ch 7, § 3, p. 104 to 110. 1 Deacon on bankruptcy, ch. 2, § —p. 178 to p. 180, edit. 1827.

the district court, it shall see fit so to order it as being for the benefit of all concerned in interest in the estate of the bankrupt. But not unless the court shall see fit so to order it. *Second*, the district court has authority in the exercise of a sound discretion, if it shall deem it for the best interest of all concerned in interest in the bankrupt's estate, to order such collateral security to be sold, or to ascertain the value by an appraisement, or in any other mode satisfactory to the court, or to allow the creditor to take the same collateral security, at its full nominal value if he shall elect so to do; and in all cases, where the collateral security shall be surrendered by the creditor, to be disposed of by the court for his benefit, and the benefit of the bankrupt's estate as aforesaid, the creditor shall be entitled to the true value of the security so ascertained as aforesaid, and shall have a right to prove his debt against the bankrupt's estate, after deducting the true value as aforesaid of such security.

JOSEPH STORY,
One of the Justices of the Supreme Court of the United States.

EX PARTE NEWHALL, ASSIGNEE OF BROWN.

All the property and rights of property of the bankrupt, *at the time of the decree of bankruptcy*, pass to the assignee to be distributed amongst the creditors, with the other assets of the bankrupt.

Property, which comes to a person, seeking the benefit of the bankrupt act, by descent, or as distributee, in the intermediate time between his filing his petition and his being declared a bankrupt, passes to the assignee as a part of the assets of the bankrupt.

The assignee takes the property and rights of property of the bankrupt, subject to all the rights and equities of third persons, which are attached to it in the hands of third persons.

Where the bankrupt, after filing his petition, and before a decree of bankruptcy, became entitled to certain property, as heir to his mother, to whom, when alive, he was indebted, it was *held*, that the administration of the decedent's estate was entitled to deduct the amount of the debt due by the bankrupt to the said estate, from the claim of the assignee of the bankrupt, for his distributive share of all the decedent's estate, including this debt.

THIS case came before the district court upon a petition by the assignee of the bankrupt, setting forth, that Brown, the bankrupt, on the 2d February last, filed his petition to be decreed a bankrupt, and on the 3d May thereafter, he was duly decreed a bankrupt. On the 20th February, Mary Brown, a widow, the mother of the bankrupt, died intestate, and Charles Brown was duly administrator of her estate. The said Mary, at the time of her death, was seized and possessed of certain goods and estate to the value of about four thousand dollars, and the said Charles, and the bankrupt, were the sole heirs. Wherefore, the assignee prayed that the bankrupt be directed to file a supplemental schedule to his petition in bankruptcy, and therein to enumerate and set forth one half of the net proceeds of his mother's

estate, now in the hands of the said administrator; so that the same might be applied to the payment of his just debts, according to the statute of the United States, in that behalf made and provided.

It appeared, upon an agreed statement of facts, that the matters of fact set forth in the petition, were true, and also, that the bankrupt was indebted to Mary Brown during her lifetime, to the amount of $1200. Upon these facts, the following points were raised by the respective parties, namely: (1.) The administrator contended, that he must retain in his hands the amount due from the bankrupt to the intestate's estate, and that he ought not to pay either to the bankrupt, or to the assignee, anything more than the balance of the bankrupt's share of the estate of Mary Brown. (2.) The assignee contended, that the whole share of the bankrupt in the said estate, without deducting the sum due by him to said deceased, should be added to the assets of the petitioner set forth in his schedule B. (3.) The bankrupt, contended that the whole of his share in the estate belonged to himself, and that the administrator could not retain, on account of the claim of the said Mary Brown, any more than the *pro ratâ* dividend, which might be hereafter declared out of his assets.

Upon the hearing in the district court, it was ordered that two questions be adjourned into the court: *First*, whether upon the accompanying statement of facts, the share in the property of Mary Brown, descended to the said George Brown, as one of her heirs at law, belongs to the said assignee, for the benefit of the creditors of the said bankrupt, or to said George, the bankrupt, for his own use and benefit? *Second*. Whether, if the said share belongs to the said assignee, the said administrator is entitled to set-off against the claim of the assignee, the amount of the debt due from the bankrupt to the estate of the said Mary Brown?

The case was now submitted by *John G. King, Jr.*, for the assignee, and by *R. Rantoul* and *F. Dexter*, for the bankrupt.

Story J. There are two questions adjourned into this court for consideration. The first, in effect, is, whether property, which comes to a person, seeking the benefit of the bankrupt act, by descent, or as distributee, in the intermediate time between his filing his petition and his being declared a bankrupt by the decree of the district court, passes to the assignee as a part of the assets of the bankrupt, or belongs to the bankrupt himself. My opinion is, that it passes to the assignee as a part of the assets of the bankrupt. The third section of the bankrupt act of 1841, chapter 9, declares, that all property and rights of property of every bankrupt, who shall, by a decree of the proper court, be declared a bankrupt within the act, shall by mere operation of law, *ipso facto*, from the time of such decree, be deemed to be devested out of the bankrupt, and the same shall be vested by force of the same decree in such assignee, as from time to time shall be appointed by the proper court for this purpose. It seems to me,

that the natural, and even necessary interpretation of this clause is, that all the property and rights of property of the bankrupt, at the time of the decree, are intended to be passed to the assignee. It is true, that the decree will also by relation cover all the property, which he had at the time of filing the petition, and at all intermediate times, to effect the manifest purposes of the act. But this is rather a conclusion, deducible from the general provisions and objects of the whole act, than a positive provision. It results by necessary implication in order to effectuate the obvious purposes of the act, and to prevent what otherwise would or might be irremediable mischiefs. But the language of the third section speaks in direct terms of property and rights of property in the bankrupt, at the time of the decree, as being devested out of him by the decree, and vested in the assignee. In the present case, there can be no doubt, that by Mrs. Brown's death, in February, 1842, the distributive share of the bankrupt in her estate, was property or rights of property vested in the bankrupt. It, therefore, falls directly under the category of the act. I take the plain distinction, running throughout the act, to be, that it is not intended to touch any property or rights of property, which may be acquired by a descent to him after the decree in bankruptcy, by which he has been decreed to be a bankrupt; but that it covers all his property, acquired by or descended to him, or belonging to him before the decree. The English statutes of bankruptcy go farther, and vest in the assignee all the property of the bankrupt, which comes to him by descent, distribution, or otherwise, before the discharge is granted. But this doctrine stands only upon the positive language of those statutes, and not upon any general principles of law, applicable to the subject.

The second question appears to me equally free from reasonable doubt. I take the clear rule in bankruptcy to be, that the assignee takes the property and rights of property of the bankrupt, subject to all the rights and equities of third persons, which are attached to it in the hands of the bankrupt. What is the distributive share of the bankrupt in his mother's estate? Plainly one moiety of all the assets of her estate. The debt due by the bankrupt to her estate, constitutes a part of her assets, and he cannot take his distributive share of the whole assets, without allowing and paying that debt out of it. Any other course would be a monstrous injustice, at war equally with law and equity and common justice. Suppose his debt were equal in amount to his whole distributive share in the other part of her assests, could it for a moment be imagined, that his assignee would be entitled to take the whole of the distributive share, in the other assets of the estate, and leave the debt to be proved against the estate of the bankrupt? The present case may not be a case of mutual debts or mutual credits, in the sense of the 5th section of the bankrupt act of 1841, ch. 9; and, therefore, to be set off. But if it is not, still, according to the rules of a court of equity, the assignee cannot now claim the distributive share of her

assets, without making all equitable allowances attached to it; and this debt is clearly legally, as well as equitably, due to her estate. The rule of distribution should be the same, as if this very debt were now paid to her estate.

To make my opinion more clear, I will suppose the facts to be, that the other assets of Mrs. Brown, in the hands of her administrator amount to $4000, and the debt due by the bankrupt to her estate is $1200. The whole assets of Mrs. Brown, are then $5200; and the distributive share or moiety of the bankrupt of these assets is $2600, from which should be deducted, as unpaid, the debt of $1200, leaving his neat distributive share, after the set off or deduction of his debt, to be $1400.

I shall direct a certificate to be sent to the district court in conformity to this opinion.

Circuit Court of the United States, Boston, September 12, 1842. It is ordered by this court, that the following answers be certified to the district court, upon the questions adjourned into this court for a final determination. *First*, upon the first question. It is the opinion of this court upon the statement of facts, that the assignee of the said George Brown, is entitled for the benefit of the creditors of the said George Brown, to his distributive share in the estate of Mary Brown deceased, as set forth in the said question, and that the said George Brown is not entitled to the same for his own use and benefit. *Secondly*, upon the second question. It is the opinion of this court, that the administrator of the estate of Mary Brown deceased, is entitled to set off or deduct the amount of the debt due by the said bankrupt, to the estate of the said Mary Brown, against the claim of the said assignee, for his distributive share of all her assets, including this debt. In other words, the debt is to be treated as a part of the assets of the estate of the said Mary Brown, to be distributed between her two heirs and distributees, and the debt of the said bankrupt is to be deducted from his moiety or distributive share, thus ascertained of the whole assets.

JOSEPH STORY,
One of the Justices of the Supreme Court of the United States.

Circuit Court of the United States, Connecticut, September term, 1841, *at Hartford. In Bankruptcy.*

DAVID WAKEMAN *v.* RUFUS HOYT.

Any person engaged in business requiring the purchase of articles to be sold again, either in the same, or in an improved shape, must be regarded as "using the trade of merchandise," within the intent of the bankrupt law.

If a trader *willingly* procures himself to be arrested or his goods to be attached, it is an act of bankruptcy, although such attachment was not *fraudulent* on his part.

The term "fraudulent conveyance," as used in the bankrupt act, does not necessarily imply moral turpitude, but is satisfied with a fraud in law, counteracting the policy of the Act, and preventing a general distribution of his property, among the creditors of a bankrupt.

A conveyance or assignment by a creditor of all his property to secure a preference to particular creditors, is of itself, a fraud upon the act of congress and an act of bankruptcy.

Where a debtor, being deeply embarrassed and pressed for security by a creditor, executed to certain family connections, mortgages and assignments of all his property, it was *held* to be an act of bankruptcy, although there was no evidence that the debtor had, at the time, any intention of applying for the benefit of the bankrupt act.

THIS was an application by the petitioning creditor for a decree of bankruptcy against Rufus Hoyt, a manufacturer and vender, at his establishment in Fairfield county, and elsewhere, of carriages, sleighs, and other vehicles. On the 15th of June, 1842, Hoyt being deeply embarrassed and pressed for security by the petitioning creditor, executed to certain family connections to whom he was indebted, mortgages and assignments of all his property, including the stock, tools, &c., in his carriage establishment, for the purpose of securing to the mortgagees a preference over his general creditors. There was no evidence or pretence that at the time of making the mortgages on which the petitioning creditor relied as constituting acts of bankruptcy, Hoyt had any intention of applying for the benefit of the bankrupt act. The application was opposed on two grounds: (1.) That Hoyt was not "a merchant or using the trade of merchandise, or a retailer of merchandise," within the meaning of the act; and (2) that the mortgages, &c., though made with the intent to secure a preference to particular creditors, were not fraudulent, and did not constitute acts of bankruptcy.

The case was argued before JUDSON J. in the district court, on the 31st of August, by *R. Booth*, and *R. S. Baldwin*, for the petitioning creditor, and by *H. Dutton* for Hoyt, and the two questions above stated were adjourned into the circuit court by the district judge, and were reargued on Thursday, the 23d inst. in that court, by *R. S. Baldwin* for the petitioning creditor, and by *R. I. Ingersoll* for the bankrupt.

THOMPSON J. on the following day, delivered the opinion of the court, in substance as follows: The first question presented for the opinion of the court is, whether this party is a trader or dealer in merchandise, within the meaning of the act of congress. We think the meaning to be attached to the words used, is, that when the party is engaged in a kind of business that necessarily requires the purchase of articles for the purpose of carrying on that business, he is a person "using the trade of merchandise" within the intention of the act. The great object is, to provide for cases where credit is required.

The case of a handicraftsman whose business is confined to the produce of his own labor merely, is different. The words of the act are, "a merchant or using the trade of merchandise." If a person is engaged in a business requiring the purchase of articles to be sold again, either in the same, or in an improved state, he must be regarded as "using the trade of merchandise." This person was a carriage maker, carrying on an extensive business, in the manufacture and sale of carriages. These may be fairly considered as merchandise; and in the transaction of his business it was necessary for him to contract debts, and use credit. When a person sells the mere produce of his own labor, he is only a seller. His business requires no purchases, and he has no occasion for credit. But Mr. Hoyt, in the transaction of his business, was necessarily both a buyer and seller. We think, therefore, that he is liable to a decree of bankruptcy, if his conduct has been such as to subject him to it.

The next question is, whether he has committed an act of bankruptcy? In order to be so declared, he must be in one of the five predicaments specified in the act of congress. These are either; (1.) departing from the state, &c., with intent to defraud his creditors; (2.) concealing himself to avoid being arrested; (3.) willingly or fraudulently procuring himself to be arrested, or his goods and chattels, lands, &c., to be attached or taken in execution; (4.) removing or concealing his goods, &c., to prevent their being levied upon; or (5.) making any "fraudulent conveyance, assignment, sale, gift or other transfer of his lands, tenements, goods or chattels, credits or evidences of debt."

In the case of an attachment in which the debtor willingly aids, it is not necessary that it should be *fraudulent*, in order to render it an act of bankruptcy. "Willingly *or* fraudulently" is the language of the act. The debt secured by the attachment or execution may be *bona fide* and justly due. Nevertheless, if the debtor being a merchant, &c., *willingly* procures himself to be attached, or his property to be taken in execution, it is an act of bankruptcy. What is there in such a transaction that partakes of fraud? Nothing, if it is an honest debt. All that the debtor does is to procure the execution to be levied on his goods, &c. Why is this an act of bankruptcy? It can be for this reason only, that he thereby does an act contrary to the policy of the bankrupt law. That policy is, in cases of hopeless insolvency, to cause an equal distribution of the trader's effects. It is on no other principle that it is made an act of bankruptcy, for a trader to aid a creditor in securing his debt, by attachment or execution. He gives thereby a *preference* to the creditor whom he so assists, over his general creditors. Then, if that be so, how does it differ from the act of bankruptcy last specified, in making a "fraudulent conveyance, assignment, &c." Does the word "fraudulent" there used, necessarily import moral turpitude? or may it be satisfied with a fraud in law, counteracting the policy of this act, and pre-

venting a general distribution of his property among the creditors of the bankrupt, by applying it exclusively to the benefit of such of them as he may choose to prefer? Whether such preference is given to a single creditor, or to two or more, is wholly immaterial. It equally counteracts the policy of the law.

If we look to the second section, it appears to me that it serves to explain what shall be deemed the kind of fraud which may render a conveyance fraudulent, within the meaning of the first section. "All future payments, securities, conveyances, or transfers of property, or agreements made or given by any bankrupt, in contemplation of bankruptcy, and for the purpose of giving any creditor, indorser, surety, or other person, any preference or priority over the general creditors of such bankrupt, &c., shall be deemed *utterly void*, and *a fraud upon this act*." From the argument as to the meaning of the word "bankrupt" a little doubt was at first created in my mind whether this applied to involuntary bankrupts at all. But I do not think the word "bankrupt," as there used, can be confined to a person who has been declared a bankrupt. It means the same as if the word "*person*" had been used instead of "bankrupt," so that it would read, "all future payments, securities, &c., made by any [*person*] in contemplation of bankruptcy and for the purpose of giving any creditor, &c., any preference, &c. The preference is made by a person in contemplation of bankruptcy, and not by a *bankrupt* after he has been declared such. And all such conveyances are declared to be "utterly void, and *a fraud upon this act*." This must refer to the acts before specified as acts of bankruptcy." Why is giving a preference to be considered a fraud on this act? Because the act contemplates an equal distribution. It is a fraud because it counteracts the policy of the law. Though it may not be fraudulent in a moral point of view, it must be fraudulent if it contravenes the policy of the law. So when the trader procures the levy of an execution on his property, it is favoring one creditor over the others. This would not be a fraud, if it were not for the bankrupt law. It is precisely as honest an act for the debtor to procure an attachment or execution, to be levied on his property by a creditor, as it is to secure to him a preference by means of a conveyance. It is fraudulent only because it counteracts the policy of the law; and this is equally true in the one case as in the other. I am, therefore, in this view of the case, of opinion, that a conveyance or assignment by a trader of all his property, to secure a preference to particular creditors, is, *per se*, a fraud upon the act of congress and an act of bankruptcy. When a part only of a trader's property has been paid or secured to a creditor, whether or not it shall be deemed an act of bankruptcy, will depend on the motive with which such payment or security was made, and the circumstances attending the transaction.

The circuit court therefore, advise that under the circumstances of this case, Rufus Hoyt has committed acts of bankruptcy, and ought to be declared a bankrupt by the district court.

District Court of the United States, Northern District of New York, July, 1842, at Auburn. In Bankruptcy.

ALBANY EXCHANGE BANK *v.* JOHNSON AND ANOTHER.

The president, cashier, treasurer or other officers of a corporation, who undertake to make proof of debts due to the corporation, in accordance with the fifth section of the bankrupt act, must receive a special appointment for that purpose.

Whether a petition *in invitum*, in behalf of a corporation, can properly be received without proof that the persons by whom it is signed and verified are in fact the authorized agents of the corporation,— *quære.*

By the terms of the fourteenth section of the bankrupt act, partners in trade cannot be decreed bankrupts *in invitum*, on the ground of insolvency alone.

Under the circumstances of this case, it was held, that no act of bankruptcy had been committed, by the parties petitioned against.

THIS was a petition by the Albany Exchange Bank that Ralph Johnson and Benjamin P. Watrous be decreed bankrupts. The petition alleged that the debtors were merchants doing business as such in the city of Albany and composing the firm of Johnson & Watrous, and contained the usual allegations as to their indebtedness. It charged them with having on the twenty-seventh day of April last, fraudulently executed a bond in the penalty of $12,000 conditioned for the payment of $10,000, together with a warrant of attorney to confess judgment thereon, to Andrew J. Johnson, Anthony Ten Eyck and Robert Johnson, on which bond and warrant of attorney, a judgment was entered up in the supreme court of the state for $12000 besides costs, on the third of May last: and also with having on the same day fraudulently executed another bond in the penalty of $3,000, conditioned for the payment of $2,000, together with a warrant of attorney, in favor of Andrew Watrous, on which a judgment was also entered up on the third day of May last, for $3,000, besides costs. The petition further alleged that writs of *fieri facias* were issued on each of these judgments on the twenty-seventh of May last, in virtue of which writs the sheriff had sold the goods and stock in trade of said R. Johnson and B. P. Watrous: that as the petitioners are informed and believe, at the time of the execution of the said bonds and warrants, the said Johnson & Watrous were, ever since have been, and still are insolvent, and that as the petitioners believe, the said bond and warrants were executed for the express purpose of securing to the obligees therein named the payment of their claims and of giving them a preference over the general creditors of the said Ralph Johnson and Benjamin P. Watrous.

On the day appointed to show cause, the alleged bankrupts, and the judgment creditors above named appeared by their counsel to oppose the granting of a decree of bankruptcy, and put in their answers and objections to the petition under oath.

The facts and circumstances relative to the judgments and executions complained of in the petition, as detailed in these answers and

the explanatory affidavit of Mr. Ferguson, the attorney for the judgment creditors, were substantially as follows: Prior to and on the twelfth of March last, the alleged bankrupts Johnson & Watrous were retail merchants in good credit, and were solvent or fully believed themselves to be so. The above named Andrew J. Johnson, A Ten Eyck and Robert Johnson were their indorsers, and Andrew Watrous was also their indorser or acceptor. A short time previous to the twelfth of March last, the alleged bankrupts applied to the said A. J. Johnson, Ten Eyck, and R. Johnson, to continue and also to increase their responsibilities as indorsers, and this "they consented to do provided the said Johnson & Watrous would give them some kind of security as indemnity against unforeseen accidents or revulsions in business." The latter therefore executed to the former, on the twelfth of March last, a bond and warrant of attorney the penalty of which bond was $12,000, and which was conditioned for the payment of $10,300.

This bond and warrant were designed for the security as well of Andrew Watrous above named, as of the persons therein named, this being expressly understood and at the time of the execution of the bond and warrant. At that time the alleged bankrupts were considered by all parties concerned, and believed themselves to be, perfectly solvent. It was not intended to enter up any judgment on the bond and warrant, unless at some future time there should unexpectedly appear to be a reason for so doing. But on the twenty-seventh of April, in pursuance of the request of Andrew Watrous, and for the sole purpose, as he stated, of giving him a separate, independent security, the alleged bankrupts executed to him the bond and warrant mentioned in the petition and at the same time executed to Andrew J. Johnson and others the other bond and warrant mentioned in the petition, on which judgments were entered on the third of May and execution subsequently issued. The alleged bankrupts expressly averred that at the time these bonds and warrants were executed they believed themselves, and the obligees in the bonds averred that they believed them to be solvent; and the alleged bankrupts denied that they were executed in contemplation of bankruptcy. Their subsequent failure or apprehension of failure which induced the entry of judgments on the bonds and warrants arose from the failure of one Oliver De Goff to whom they had loaned their notes, for whom they were responsible as indorsers, and in whose solvency they had full confidence until the time of his failure.

Gould for the petitioning creditor. *J. Hammond* for the respondents.

Conkling, J. One of the objections urged at the bar to a decree of bankruptcy in this case is, the want of any sufficient evidence that the two persons who signed the petition, and by whom the debt due to the petitioners was proved, had authority thus to act.

To the name of one of them the abbreviation, "*Cash'r*," and to the name of the other the abbreviation "*Pres't*," is added; and in the jurat of the commissioner, they are respectively denominated the president and the cashier of the Albany Exchange Bank. The fifth section of the bankrupt act provides that "corporations to whom any debts are due may make proof thereof by their president, cashier, treasurer, or other officers, who may be specially appointed for that purpose;" and by one of the rules of the court, petitioning creditors are required to prove their debt before presenting their petition. If, as I think is the case, the qualification "who may be specially appointed," etc. applies as well to the officers named, as to any "other officer" who may undertake to act in behalf of a corporation, it would seem to follow that for the purpose of proving a debt to a corporation, by the oath of one of its officers such officer must receive a special appointment for that purpose.

Indeed, independently of the above recited provision of the act, it may well be doubted whether a petition of this nature in behalf of a corporation, could properly be received without proof that the persons by whom it was signed and verified were in fact the official organs or the authorized agents of the corporation. But as this objection was overlooked at the time the rule to show cause was granted, and as at this stage of the proceeding the petitioning creditors ought probably, at any rate, to be allowed to supply the deficiency, I deem it proper, in this instance, to pass over the objection and proceed to a brief examination of the merits of the case.

It is well known that a very large proportion of the commercial and mercantile business of this country is carried on by means of mutual credit, and it cannot, I think, be conceded that a solvent merchant may not lawfully give security in any of the accustomed forms, in good faith, to another, as the condition on which he is from time to time to receive a loan of the credit of the latter, and for the purpose of securing him in anticipation against the vicissitudes of trade. It is true the practice of giving such security, especially by bond and warrant of attorney, may lead to consequences which it is the policy of bankrupt laws, as far as is consistent with the general interests of trade, to prevent. But such security given to an indorser, is no more obnoxious to this objection than the like security would be if given to secure the payment of money borrowed to be employed in trade. If, therefore, the indorsers in this case, instead of taking the separate bonds and warrants executed on the twenty-seventh of April, as a substitute for the bond and warrant executed on the twelfth of March, had contented themselves with this original security, which there is no just pretence for supposing to have been given in contemplation of bankruptcy, or for the purpose (within the meaning of the first section of the bankrupt act) of willingly or fraudulently procuring the goods of the obligors to be taken in execution, I should not have hesitated to decide that no act of bankruptcy had been committed. The

change of security was undoubtedly a hazardous experiment, and the fact that the new bonds and warrants were for a larger sum than that for which the original security was given, is a circumstance which increases the difficulty of the case. But it is to be considered that neither the bond and warrant of the twelfth of March, nor the two bonds and warrants of the twenty-seventh of April, were given to secure any specific or ascertained amount, but only for the purpose of indemnity against contingent liabilities. The motive, if there was any, for thus increasing the amount does not appear, and it seems reasonable to suppose that it was the effect of inadvertence or caprice on the part of the person who was employed to draw the new securities; for when executions came subsequently to be issued, the aggregate amount which the plaintiffs claimed a right to levy, fell short of the amount of the original bond. Upon the whole, therefore, I cannot take it upon myself to decide that the substitution of the securities of the twenty-seventh of April, for the security of the twelfth of March, changed the legal predicament of these debtors, under the bankrupt act. This case differs essentially from that of the Messrs. Loomis, decided last week. In that case the bond and warrant were executed for the avowed purpose of giving a preference to indorsers, for liabilities already incurred, under the apprehension of impending bankruptcy. Perhaps in that case too much importance was ascribed to the fact that execution was immediately sued out, when by a late statute of this state executions are not permitted to be issued until after the expiration of thirty days from the entry of the judgment. On the argument of that cause, I inquired of the counsel whether the act was applicable to judgments confessed under a warrant of attorney containing the usual release of all errors in the judgment and in the issuing of execution. The answer of the counsel for the petitioning creditors was in the affirmative; and this answer was acquiesced in by the counsel for the debtors, and was corroborated by the opinion of a highly intelligent gentleman of the profession whom I subsequently consulted. On the argument of the present case, however, its correctness was denied. The question does not appear to have arisen in the state courts, and I doubt whether as between the judgment debtor and creditor, the former would be entitled to any relief against an execution issued within the thirty days upon a judgment thus confessed; although as between a judgment creditor of this description and another judgment creditor who had obtained his judgment by the ordinary mode of adverse process, a different rule ought perhaps to prevail. If this be so, the suing out of executions, and the seizure of the debtor's goods a few days before the expiration of the thirty days without resistance on their part, was an unimportant circumstance. My conclusion is, 1. That in the giving of the securities in question in this case, there was no actual fraud; 2. That they cannot be considered as having been voluntarily given in contemplation of bankruptcy for the purpose of giving an unlawful preference; and, 3. That these

debtors are not chargeable with having "fraudulently or willingly procured their goods, &c. to be taken in execution."

It remains to inquire whether they are liable to be declared bankrupts in virtue of the fourteenth section of the act. It is very clear that the petition was not drawn with a view to this section, and that the allegation that the debtors are insolvent, was introduced only for the purpose of giving character to the alleged acts of bankruptcy. The argument of the counsel for the objectors, that the debtors ought not upon this petition to be called upon to meet this allegation, therefore, was not without plausibility and weight. But I propose for the present to pass by this objection, and to consider the petition, taken in connexion with the admissions of the objectors, as sufficient to raise the question whether partners in trade can be declared bankrupts on the petition of a creditor, on the ground of insolvency alone. It must be admitted that such seems to be the literal import of the language of the fourteenth section. It declares "that when two or more persons, who are partners in trade, become insolvent, an order may be made in the manner provided in this act, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners; upon which order all the joint stock," etc. The question whether this enactment is to receive a literal interpretation with respect to the point now before the court, it will be perceived at a glance, is one of very great importance: for if the provision is to be so interpreted, it will introduce a principle of great comprehension and stringency, which has not hitherto found a place in the bankrupt laws of England, and which had no place in the American act of 1800. Its practical operation would unquestionably be very severe, and it is to be feared, in many instances, unjust. So far as mercantile partnerships are concerned, it would subvert the well settled maxim of English law, that men may be insolvent without being bankrupts, and become bankrupts without being insolvent; for while it would declare that insolvency shall of itself constitute bankruptcy, the absence of any other provisions in the act authorizing proceedings against partners jointly, would leave it at least doubtful whether partners in trade could be jointly decreed bankrupts on the petition of a creditor, on any other ground than that of insolvency.

It is obvious, I think, that the execution of the act under such a construction would be attended with numerous and very serious embarrassments. What is to be considered as constituting insolvency in the sense here intended? Is a mercantile firm to be adjudged to have "become insolvent" upon its first failure, and under whatever circumstances, to meet its pecuniary engagements? Few, I imagine, could be found who would assert the reasonableness of such a rule. Is it to be pronounced insolvent whenever its assets are insufficient to discharge all its liabilities, however small may be the deficiency? If so, how is this fact to be ascertained? It would be easy, but it is unnecessary to illustrate the pertinency and force of these questions. Such a con-

struction of this section would also involve what seems to me a striking inconsistency; for if it is just and expedient that partners in trade should be liable to be decreed bankrupts, *in invitum*, on the ground of insolvency alone, why should not individual traders be subject to the same liability? This construction, as already observed, is suggested by the literal import of the phrase "become insolvent;" and it may, I think, be added, that this is the only circumstance by which such a construction is recommended. But if these words are to receive a literal interpretation, I see not why the residue of the clause in which they occur ought not also to receive a like construction; and then it would follow that any insolvent mercantile firm might be decreed bankrupt on the application of any creditor, without regard to the amount of the indebtedness of such firm, or to the amount of the debt owing to the petitioning creditor; for the clause in question contains no limitation whatever, with regard to either of these points. Are we then to conclude that this further innovation and inconsistency were intended? Then again, it declares that in the cases embraced by it, "an order may be made in the manner provided in this act." What order is here meant? To determine this point, resort must be had to the antecedent parts of the act. But the act says nothing of any "order" adapted to the case. It provides for the granting and entering of decrees of bankruptcy; but these decrees are, I believe, no where called orders — while the act does speak of making orders for other purposes. I presume, however, that the phrase "an order may be made," was intended to import that a decree of bankruptcy might be entered. This criticism will serve to show the generality and looseness which characterize the language of this whole provision.

This act is universally admitted to be highly obscure, and much of its obscurity seems to me to have been caused by an attempt to embrace the two descriptions of cases for which it provides, by the same forms of language, instead of keeping them separate, and adapting the phraseology to each, without regard to the other; and the clause under consideration presents, I think, an example of the truth of this remark. Its terms, it will be seen, are perfectly suited to cases of voluntary application. These are all founded on the admitted insolvency of the applicant. It is important to remark, also, that there is abundant scope for the operation of this provision even in regard to compulsory cases, without giving to it the literal construction in question, because the antecedent provisions of the act relate, in terms, only to individual bankrupts, and this provision was proper for the purpose of authorizing proceedings under the act against partners. The clause in question, under this view of its object, forms a natural and proper introduction to the important and more happily expressed provisions which follow, concerning the duties of assignees and the mode of distributing the estates of bankrupt partners. I consider the last provision of this section, moreover, as militating strongly against a literal construction of the first clause. It declares that "in all other respects," (i. e.

except as to the duties of the assignee and the mode of distribution,) "the proceedings against partners shall be conducted in like manner as if they had been commenced and prosecuted against one person alone." This provision, it appears to me, goes far towards an express adoption of all the conditions and limitations prescribed by the act relative to individual cases. Upon the whole, therefore, I am of opinion that in respect to compulsory applications, the phrase "become insolvent" in the first part of the fourteenth section of the bankrupt act, is to be interpreted as equivalent to the phrase shall commit any act of bankruptcy.

I am aware that this decision may excite some surprise; but it is the result of mature reflection, and I fully believe it to be sound. This petition must accordingly be dismissed, with costs.

District Court of the United States, Southern District of New York. August, 1842, at New York. In Bankruptcy.

[At the close of the sittings of the district court for the southern district of New York, in August last, Judge Betts delivered opinions in writing in the following cases. A synopsis of the points decided is now presented. The opinions *in extenso* would occupy too much space to be inserted in our journal in a single publication. It is proper to remark, that notices of these decisions have been published in the New York newspapers, but they have since been revised and corrected, and now have the sanction of the court.]

In the matter of Hull and Smith.

Involuntary bankruptcy — Partners — Insolvency.

This was a case of compulsory proceedings against the parties, as partners, and fraudulent bankrupts. The court decided that creditors holding debts due before the passage of the bankrupt act, were competent parties to prosecute their debtors to a decree of bankruptcy. That a purchase of goods by copartners, on credit, with intent to a fraudulent insolvency, and a fraudulent transfer and appropriation of such purchases in execution of that intent, during the autumn of 1840, the debtors then being, and still continuing partners, rendered them subject to the bankrupt law; and that a petition that they be declared bankrupts thereupon, would be sustained by the court. That acts of bankruptcy committed by one of a firm, subsequent to the passage of the act, would not support proceedings against both partners. That the mere insolvency of a partnership, or the partners, does not authorize proceedings against them as involuntary bankrupts, without proof of the commission of some act of bankruptcy by the partnership, and that the term insolvency, as used in the fourteenth section of the act, is to be regarded as equivalent to bankruptcy.

S. Dutcher for the creditors. *A. S. Johnson* for the bankrupt.

In the matter of John Bailey.

Discharge of bankrupt — Fraudulent concealment of property — Evidence.

This was a voluntary petition to be declared bankrupt, opposed by creditors because the bankrupt had intentionally withheld property from his inventory, &c. The court decided, that the creditors, to defeat the decree of bankruptcy, must prove that the bankrupt had property at the time of his application, which he knowingly and intentionally omitted to state on his inventory. That the evidence reported by the commissioner, showing the bankrupt had earned and possessed property in years past, was not sufficient to support the objections, or to cast on him the necessity of accounting for it, unless it was further made to appear, that he had property at a period near to the time he asserts his insolvency. That a want of providence in the management of property, or a refusal to appropriate it to the payment of debts, or even proof that it was dissipated or squandered dishonestly, would not afford a bar to a petition under the act. That the purchase of the bankrupt's furniture by his son-in-law at an execution sale, though the goods were left in possession of the bankrupt's family subsequently, (but not remaining with him at the time of his application,) nor the purchase of his real estate at a mortgage sale by another son-in-law, do not afford presumptive evidence of an ownership remaining in the bankrupt, which would require him to account for such property on his schedules.

Charles Morrell, for the creditors. *A. D. Janisen*, for the bankrupt.

In the matter of Brown King.

Discharge of bankrupt — Opposition by "*persons in interest*" — Practice.

Exception before a commissioner, on a reference to him, that the party opposing was incompetent to file objections as creditor, he not having proved any debt; and the exception overruled by the commissioner. The court decided that the exception was properly rejected; that such exception could not be taken at the commissioner's office, but should be filed in court before an order of reference was made; but held, that the strictness of practice in courts of civil and common law, which regard grounds of exception not presented in proper order in the progress of a cause, as waived, would not be enforced in bankrupt proceedings. The court further decided, that creditors, as such, could not file objections and contest the right of a bankrupt to a discharge, without first proving their debts; and that

the term "*other persons in interest*," used in the fourth section, are employed to designate those who could not prove debts as creditors, and does not embrace, but excludes creditors.

The objections for this cause disallowed.

William S. Sears, for the bankrupt. *Thompson* and *Fessenden*, for the creditors.

In the matter of David H. Robertson.

Fraudulent Conveyance — Fictitious debt.

Objections that the bankrupt be decreed a bankrupt, because of his omission to set forth in his inventory real and personal property owned by him, and because of having set forth a false and fictitious debt. The court decided, that if the purchase by the bankrupt of the house and lot, and payment of $6000 thereon by him, and the conveyance of the title thereof to his mother, was fraudulent as against his creditors, still there remained no right of property therein to him, which he could claim or recover, and that accordingly he was not bound to inventory it as his estate. The court further decided, that though the confession of judgment by the bankrupt to his mother, might be without just consideration, and therefore void as against his creditors, the judgment was a debt as against him, and being confessed before the bankrupt act was passed, could not have been created in fraud of the law, and with intent to set it forth in these proceedings. It is not rendered void by any provision of the bankrupt law, and being a debt which the bankrupt might be compelled to pay, the objections that the schedule containing it, contains a false list of creditors, and of the amount due to each, cannot be sustained, because of this particular. The court further decided, that an execution sale of the petitioner's horses, carriages, household furniture, &c., on execution issued under the judgment confessed to his mother, although made at his instance, and under his direction, divested his title to the property, and he could not claim it, or recover it against her, and accordingly need not set it forth on his inventory. His subsequent possession of, and enjoyment of the property as his own, were strong badges of fraud, and might render the sale of no effect as to his creditors, but it cut off his right to set up title to the property, or to assign it as his own. Objections overruled without costs.

A. Nash, for the bankrupt. *Thomas Fessenden*, for the creditors.

In the matter of Charles P. Houghton.

Allegation of fictitious debt.

The court had decided, on a previous hearing, that the father of the

bankrupt being assignee of his estate under a voluntary assignment, could not purchase debts owing by the bankrupt, at a discount, with such trust funds, and hold them as against other creditors for their full face, and it had been referred to a commissioner to take proofs on the allegation by creditors, that the bankrupt had in his schedule stated his father to be creditor for the whole amount of obligations known to him to have been so purchased. The court decided, on the coming in of the proofs, that the preponderance of evidence was, that the obligations had been bought with the funds of the father, and no part of the estate of the bankrupt had been applied in the purchase, and that the father had bought the claims as his own exclusively, and upon such fact it was further decided, that the debts remained good and subsisting against the bankrupt for their full amount in the hands of his father, whatever might be his rights as against the creditors of the bankrupt, and that accordingly the bankrupt properly stated his father to be his creditor to the full amount of the notes, &c.

F. Sayre, for the bankrupt. *P. J. Joachemssen*, for the creditors.

In the matter of John Q. McCarty.

False inventory — Evidence — Practice.

This case was heard on objections and proofs reported by a commissioner. The court decided, that the only matter involved in the objections that the bankrupt had not made a true inventory of his property, was the fact of his actual condition at the time his application was made. That evidence falsifying his allegation, that he casually lost $3300 in the year 1839, would not be sufficient to disprove the verity of his petition and inventory, without facts or circumstances connecting his possession of the money more directly with the time of his application. *Quære*, whether if the creditor examines the bankrupt on oath, to a fact, to which he directly testifies, and afterwards discredits his testimony as to particulars bearing upon the fact, he has a right to infer the fact to be contrary to the express assertion of the bankrupt. The court further decided, that an assertion of a fact made by the bankrupt's wife in his presence, and denied by him, could not be given in evidence to impeach the testimony of the bankrupt. The court further decided, that a voluntary conveyance of property by an insolvent, before the passage of the bankrupt act, to his mother and son-in-law, under circumstances rendering the conveyance void as to creditors, divested all his personal right and interest therein, so that he could not represent it as owned by him, and need not accordingly set it forth in his inventory.

A. G. Rogers, for the bankrupt. *H. Holden*, for the creditor.

In the matter of John Ely.

Practice — "Persons in interest."

On the coming in of the commissioner's report, exceptions were taken by the bankrupt to the competency of the opposing party to the objections on the ground that she was not a creditor. On the 9th March, 1835, the bankrupt executed a bond and mortgage to Mrs. Traphagen. She assigned the bond and mortgage to Bernard L. Simpson, May 1, 1836, to secure a debt owing him, and also the payment of rent, &c., on premises leased of him, and stipulated that the assignment should become absolute on her failing to pay. Simpson assigned his interest therein to Mr. Cram, May 14th. In 1841, Cram sued the bond in the name of Mrs. T., and recovered judgment; his claims against Mrs. T. would absorb the judgment within about $200. Messrs. Grahams prosecuted a creditor's bill against Mrs. T., and April 12, 1841, she assigned to a receiver in that suit, all her estate, effects, interests, &c., &c., but she is contesting the creditor's bill with the complainants, and the case yet remains undecided between them. The court held, that the assignment to Simpson, notwithstanding the absolute clause on her default to pay, was only by way of security, and did not render the bond his property, or that of his assignee. That the assignment of Mrs. T. under the creditor's bill, only placed her effects in the custody of the law, and did not transfer her title so entirely but that she possessed an interest dependent only upon the termination of the chancery suit in her favor. If in judgment of law, she no longer stood in the relation of creditor to the bankrupt, she was interested in obtaining the whole debt from him, as that would increase the funds passed to the receiver in extinguishment of the claim in chancery, and furthermore, because if that bill is displaced, equity would secure the restoration of the fund to her. The act authorizes creditors who have proved their debts, and other persons in interest, to oppose the discharge, and in the one character or other she makes out a clear title to file the objections. Exceptions overruled.

E. H. Ely, for the bankrupt. *Benedict* and *Belknap*, for the creditors.

In the matter of Maynard Bragg.

Examination of the bankrupt.

This cause came up on exceptions to decisions of the commissioner, rejecting and admitting evidence. The court held, that when a bankrupt is examined under oath by creditors, he has a right, by way

of cross-examination by his counsel, to give explanations or corrections of statements made on his examinations in chief: but his counsel cannot examine him at large and draw substantive evidence from him in support of his petition, and against the objections, as in the ordinary cross-examination of witnesses. His answers are evidence only in the particulars or discovery inquired of by the creditors. The court further held, that a former examination of the bankrupt before a master in chancery, was competent evidence to be received by the commissioner.

As declarations of the bankrupt in respect to his estate, it may be used to qualify or contradict his statements in his petition and schedules in this proceeding. The decision of the commissioner was affirmed on both points.

Charles Sherwood, for the bankrupt. *George Bowman*, for the creditors.

In the matter of Orrin Brown.

Attorney's lien — Waiver.

The bankrupt set forth, on his inventory, three promissory notes, as part of his estate, amounting to four hundred dollars. The general assignee moved the court for an order on the bankrupt to deliver up those notes, they not being produced after the decree of bankruptcy. The counsel of the bankrupt, interposed his claim of lien on the notes, for attorney's costs and counsel fees in a chancery suit, instituted antecedent to the petition in bankruptcy. The court decided that congress manifestly intended to leave undisturbed to creditors, all benefit of *securities* existing in their behalf, and that tacit liens or privileges recognised by the local law or general principles of law, were preserved by the second section of the bankrupt act. That an attorney has a lien on papers of his client in his hands, covering his general balance of costs for professional services, unless the papers are deposited, and accepted by him for a special purpose. That the transmission of his papers by the bankrupt to the attorney, through an agent, with a view to prepare his proceedings in bankruptcy, and with intent that they should pass with the rest of his estate to the assignee, does not make the deposit special, without the assent of the attorney; and that the statement of the notes on the schedule, as part of the bankrupt estate, by the attorney is not a waiver of his lien thereon; or conclusive evidence, that he held them for that purpose alone. That the presentation of a petition in bankruptcy, is an inchoate dedication of the estate to his creditors by the bankrupt act, which is made final and effectual by passing the decree of bankruptcy. That no priorities in favor of particular

creditors can arise subsequent to that time, which will attach upon the estate, except pursuant to the provisions of the 5th section, and that the lien of the attorney ceases, with the entire termination of the interest of his client in the assets, unless his services are continued at the instance of the assignee, and his costs after that, become a debt against his client, personally merely. That the counsel being associated in copartnership with the attorney, the lien extends to his fees as counsel equally as to those of attorney. That attorney and counsel under our laws have the same remedies for their fees, at least, items that are taxable; and as the attorney's privilege is ordinarily limited to taxed costs, the like rule should apply to counsel, and no lien should be raised in his behalf as against third parties for *quantum meruit* services, or an agreed compensation, exceeding the taxable allowances. The court pronounced no opinion as to the extent of the lien on papers, as between counsel and his client alone, or whether it exists, when the counsel does not also stand in the relation of attorney in the case. The court decided that both attorney's and counsel's taxed costs, for services, up to the application in bankruptcy, be satisfied by the assignee out of the notes, and also the costs of the reference.

Stephen J. Field, for the petitioner. *Waddell,* official assignee, opposing.

In the matter of Moritz and Pinner.

Voluntary petition by partners — construction of the 14th section.

Various objections were interposed by creditors to a decree of bankruptcy being rendered, only two of which were particularly pressed in this stage of the case. The petitioners, many years since, were bankers and partners in Germany, where it is charged, they became insolvent fraudulently, and afterwards absconded to the United States. Their partnership was dissolved before they left Germany, and was never renewed in this country, nor have they contracted any joint debts here. All their partnership debts were contracted in Europe, to foreign creditors. The petition was joint and several praying a decree of bankruptcy in their favor as copartners, and also in behalf of each partner, individually. The court did not discuss the point, whether foreign partners could become voluntarily bankrupt here in respect to debts, creditors, and estate, entirely foreign. But decided, that partners, as such, could not by voluntary petition be declared bankrupts, except under the 14th section. That if the provisions of that section are applicable at all to the case of voluntary bankruptcy, they are so, only in the case of those who at the time the petition is presented are partners. That

no number less than the whole of a firm, can petition for a decree of voluntary bankruptcy under the 1st section, and that it is at least doubtful, whether the application of that section is not limited to cases of compulsory bankruptcy in respect to copartnerships. That in case of compulsory bankruptcy, the same reasons would not exist for restricting proceedings to cases of existing partnerships, and accordingly, the decision in this case is not to be considered as prejudging that point. The court further decided, that proceedings in bankruptcy as at law, and in equity, could not be conducted in the united names of parties who have no common interest, and do not seek a common decree. That individuals cannot associate and make a joint and several petition, with a view to a separate decree, in favor of each applicant, and that accordingly the petition in this case being disallowed as to the two petitioners conjointly, could not avail them individually, and it was dismissed with costs; with leave, however, to amend it, if that could be done without varying its essential structure and statements, so as to retain it as the sole petition of one of the parties, at their election, between themselves.

James T. Brady, for the petitioners. *P. J. Joachemssen* and *Charles Edwards*, for the creditors.

In the matter of Hill and Van Valkenburgh.

Involuntary bankruptcy — Defective petition — Amendments.

This was a case of compulsory bankruptcy, and on the day for showing cause why a decree should not pass, exceptions were taken on the part of the debtors to the sufficiency of the proceedings; some of which were merely formal, and some rested on matters of substance. The court decided, that the *jurat* subscribed by the commissioner need not contain a *venue*, when it could be sufficiently collected from the deposition itself, that the oath was administered where the officer resides. That if a debt must be due, to found these proceedings, yet a promissory note over due on its face when the petition was sworn to, and actually due by the expiration of the days of grace, at the time the petition was presented to the judge, and was acted on by him, was sufficient to authorize and support the proceedings; that the application to the court, is the time the petition comes into action, and not the date of its subscription or attestation. The court further decided, that the petition on its face must show that an indebtedness above $2000 accrued, against the parties in their partnership capacity, and that it was not enough that the parties (by name) owed over $2000. It was further decided, that the petition must allege, that the acts of bankruptcy were committed during the continuance of the partnership, and for these de-

fects the petition was disallowed. On a motion to amend the petition in these particulars, subsequently made by the creditors, the court decided, that this court has under the act, ability to allow amendments in support of the justice of a case, when by the more rigid rules of practice in bankruptcy in England, like favors might possibly be denied. But even there, as appears from the authorities cited, the refusal to permit amendments, usually rests on a reluctance to vary a commission issued and under execution, or to introduce new foundations for the proceedings, which shall also protect steps already taken without legal justification. The court being satisfied from the affidavits of the creditors and counsel, that the defective averments in the petition, resulted from misapprehension of the counsel, who had the facts properly communicated to him, will permit the amendments to be made on payment of costs.

John Van Vleeck, for the petitioners. *P. J. Joachemssen*, for the bankrupts.

In the matter of Charles Oakley.

Practice — Decree of bankruptcy, vacated.

Objections were interposed to the decree of bankruptcy, resting in part on matters of fact, touching the integrity of the bankrupt in his statements, and in part on points of law, as to the sufficiency of the schedules on their face. The legal objections were first set down on the calendar, and argued, as taking precedence of any inquiry into the merits. The court, on the hearing, decided that the papers were insufficient, and that the bankrupt could proceed no further, unless the schedules were properly amended. The petitioner thereupon proceeded *ex parte* to file amendments, and without submitting his amendments to the court for its *allocatur*, or obtaining the assent of the opposing creditor, moved for, and took a decree of bankruptcy. The court decided that this decree be vacated as irregular; that the petitioner if his proceedings in relation to the amendments, could be upheld, could not in that way override the objections to the merits of his application. Those were referred to a commissioner and must be investigated and properly disposed of, before any steps could be taken towards a decree. That investigation was properly suspended until questions of form were settled, and the creditors now had a right to pursue the reference before a commissioner, on the merits. Decree of bankruptcy vacated with costs.

Morris, for the petitioner. *P. J. Joachemssen*, for the creditors.

In the matter of Aaron Abrahams.

Presentation of petition — Practice.

The court decided that a petition, need not be presented to the court simultaneously with its attestation; and its being sworn to, nine days before presented, afforded no bar to it. The decree of bankruptcy retroacts to the time of the application, and if property is acquired by a bankrupt, intermediate the verification and offering of his petition, it would pass to the assignee. That written objections to the sufficiency of the papers, with others to the merits, will not authorize a delay of reference to a commissioner, upon those involving an inquiry into facts, unless there is plain probable cause for taking the legal points. The court will be careful that such a method of procedure, shall not avail to purposes of procrastination merely. The court accordingly refused granting an order now to refer the objections to a commissioner, because of the long delay and laches of the creditors in not pursuing them, and the case being regularly on the docket for a final order, directed a decree of bankruptcy to be entered.

Brady, for the bankrupt. *Joachemssen*, for the creditors.

Supreme Judicial Court, Massachusetts, September Term, 1842, at Lenox.

Ex Parte Bela Judd.

On the twenty-fourth day of December, 1841, Bela Judd made his application to a Master in Chancery for the benefit of the insolvent law of Massachusetts of 1838, chap. 163. A warrant issued on said application, and was returned on January 24th, 1842, on which day there was a meeting of the creditors of said Judd; but no debts were proved; and the meeting was adjourned to February 1st, when some of Judd's creditors proved their debts, and the meeting was adjourned to the 7th day of February; at which meeting he filed his objections to any further proceedings, because the law of the United States, establishing a uniform system of bankruptcy, suspended the insolvent law of Massachusetts, and the master no longer had jurisdiction in the matter. The objection was overruled by the Master, and the creditors proceeded to the choice of an assignee, and the Master made an assignment of said Judd's property to him. The law was in force from and after the first day of February, 1842. This was a petition to have the proceedings stayed or set aside. The ground taken by the counsel for the petitioner was, that the law of the United States suspended the insolvent law in all cases. There was no saving clause in it. To decide that there were cases not suspended by it, would be to decide, that in those cases the law of the United States was itself suspended by the State law. For where the one had force, the other would not. If, however, before the law of the United States took effect, property of an insolvent debtor had been conveyed to the assignee, he could hold it, having acquired a lawful title to it; and must hold it, and dispose of it, in trust, for the purposes for which it was assigned. In this case, the property not having been assigned until after the Act of Congress became a law, the assignment was of no effect.

Byington for the petitioner. *Tucker* for the assignee.

Hubbard J. delivered the opinion of the court. They recognised and confirmed the opinion of Mr. Justice Story in the *Matter of Eames*, (5 Law Reporter, 117); but held, that in all cases where proceedings were *commenced* under the State law, before the law of the United States took effect, these laws were not suspended; but the estate should be wholly settled under the State insolvent law.

INTELLIGENCE AND MISCELLANY.

ANCIENT WELSH LAWS. In the year 1822, the English House of Commons authorized a series of publications, under the title of the History of Britain, of which two works have recently been published, namely, the Ancient Laws and Institutes of Wales, and the Ancient Laws and Institutes of England. The last named work consists chiefly of Anglo-Saxon laws; the former comprises the laws supposed to be enacted by Howel the Good, modified by subsequent regulations under the native princes prior to the conquest by Edward I., and certain anomalous laws; and is reviewed in a late English Law Magazine. Both of these publications must be regarded as valuable, affording a correct index to the state of the people and the times when these laws were in operation. The most ancient laws and institutions of the Isle of Britain are involved in utter obscurity; but about the tenth century, Howel Dda, or Howel the Good, who was a king in South Wales, compiled certain laws, which exist in several versions, under the respective names of the Venedotian, the Dimetian and Gwentian Codes. The manner and the grounds upon which the Venedotian Code was compiled, is thus stated in the preface to it. "Howel the Good, the son of Cadell, prince of all Cymru, seeing the Cymry perverting the laws, summoned to him six men from each cymwd in the principality, the wisest in his dominion, to the White House on the Tav; four of them laics and two clerks. The clerks were summoned lest the laics should ordain any thing contrary to the Holy Scriptures. The time when they assembled together was Lent, and the reason they assembled in Lent was, because every one should be pure at that holy time, and should do no wrong at a time of purity. And with mutual counsel and deliberation the wise men there assembled examined the ancient laws; some of which they suffered to continue unaltered, some they amended, others they entirely abrogated, and some new laws they enacted."

This Code is divided into three books. The first treats of the "Laws of the Court," the second, of the "Laws of the Country," the third is the "Proof Book." The first chapter of the "Laws of the Country" begins with the "Laws of the Women." They provide for the division of the children between man and wife, "two shares to the father, one to the mother." The division of the household furniture is very curious and minute and worth quotation, though rather long. The household furniture is to be thus shared: all the milking vessels, except one, go to the wife; all the dishes, except one dish, to the wife, and those two go to the husband; the wife is to have the car and the yoke to convey her furniture from the house. The husband is to have all the drinking vessels; the husband is to have the riddle; the wife is to have the small seive. The husband is to have the upper stone of the quern, and the wife the lower. The clothes that are over them belong to the wife; the clothes that are under them belong to the

husband until he marries again, and after he marries, the clothes are to be given to the wife; and if another wife sleep upon the clothes, let her pay wyneb-werth to the other. To the husband belong the kettle, the bed coverlet, the bolster of the dormitory, the coulter, the fuel axe, the auger, the settle, and all the hooks except one, and that to the wife. To the wife belong the pan, the trivet, the broad axe, the hedge bill, the ploughshare, all the flax, the linseed, the wool, the house-bag with its contents, except gold and silver, which if there be any are to be shared: the house-bag is the hand-bag. If there be webs they are to be shared; the yarn balls to the children if there be any, if not, they are to be shared. The husband is to have the barn and all the corn above-ground and under-ground; the husband is to have all the poultry and one of the cats, the rest belong to the wife.

The provisions are to be thus shared: to the wife belong the meat in the brine, and the cheese in the brine; and after they are hung up they belong to the husband; to the wife belong the vessels of butter in cut; the meat in cut, and the cheese in cut: to the wife belongs as much of meal as she can carry, between her arms and knees, from the store-room into the house.

Sexual offences are regulated with great precision. Here is a specimen or two: If a maid be given to a man, and she be found by the man to be deflowered, and he allow her to remain in his bed until the following morning; he cannot on the morrow take away any of her due: 'sed si, postquam illam vitiatam deprehenderit, surrexerit ad pronubos et testaretur eis se illam vitiatam invenisse, et non concubuerit cum illa ad crastinum usque; nihil ab eo in crastinum habeit. Si mammæ et crines et menses apparuerint tunc lex pronuntiat neminem posse certo scire num virgo sit necne, propter hæc signa;' and therefore the law allows her to be exculpated by the oaths of seven persons, including her mother, her father, her brothers, and her sisters. If she will not be exculpated, let her shift be cut off as high as her hip; and let a yearling steer be put in her hand, having his tail greased with tallow; and if she can hold him by his tail, let her take him in lieu of her share of the argyvreu, and if she cannot hold him let her be without any thing.

The dictum of Judge Buller, that a man was entitled to beat his wife with a stick as thick as his thumb, appears to have been based on an early Welsh law: "If a wife speak an ireful word to her husband, such as wishing drivel upon his beard, or dirt in his teeth, or call him a cur, she is to pay him three kine camlwrw, for he is lord over her; or if she like it better, to be struck three strokes with a rod of the length of the forearm of her husband and of the thickness of his long finger, and that wheresoever he may will excepting her head."

We are glad to see that cats were an object of legal solicitude. The laws upon this subject were more sensible than at the present day, when no one is held to answer for their "caterwauling every moon," or that they are "good mousers." If a man parted from his wife, he was to take away only one, and leave the rest. "Whoever shall sell a cat, is to answer for her not going a caterwauling every moon, and that she devour not her kitten, and that she have ears, eyes, teeth, and nails, and being a good mouser."

CRITICAL NOTICES.

A CHARGE TO THE GRAND JURY, upon the uncertainty of the law, and the duties of those concerned in the administration of it. Delivered on the Circuit, 1841 and 1842. By CHIEF JUSTICE PARKER, (of New Hampshire.) Published by request. Concord, N. H. Luther Hamilton. 1842.

We have read this Charge with much pleasure. Its views are just and sound and well expressed. It flows from a judicial mind, well saturated with law learning, familiar with men and business, and free from prejudiced or one-sided views. Its candor and temperateness of expression commend it to the favorable regards of those, who may not be disposed to assent entirely to all the views contained in it. The elements of uncertainty in the law are traced by Mr. Chief Justice Parker to that imperfection which belongs to the human mind and to human society, and not to any peculiar defects in the law itself or in its administration. Men differ in the constitution of their minds and draw different inferences from the same premises. Where facts are in dispute, many and fruitful sources of error spring up. Witnesses are deceived and honestly mistaken. Some see and hear better than others. Prejudice, fear, and affection, all give a peculiar coloring. There are elements of uncertainty found, when all parties are honest and actuated by a sincere motive to elicit the truth. There are others founded in moral defects. Upon this point, we will allow the author to speak for himself.

"But there are other causes, in some instances, which make it difficult to arrive at the truth of the matter in controversy. There may be, and perhaps is sometimes, a suppression of the truth by the intimidation of witnesses, and by persuading men of weak minds that they cannot safely testify to what they actually know — and there may be, and sometimes is, a procuration of additional testimony, by persuading witnesses that they recollect that of which they never had any knowledge. Constant reiteration may in some instances do this, where the individual operated upon is neither dishonest, nor much below the average grade of intellect. In both of the foregoing instances there is a perversion of the truth; and whether it be by its suppression, or by additions which do not belong to it, the agent, who designedly accomplishes the object, stands, in a moral point of view, little better than him who is directly guilty of subornation of perjury. There is also a fraudulent suppression of the facts in some instances, by hiring witnesses to be silent, or to absent themselves — and there is, furthermore, subornation of perjury, and perjury itself, which, when resorted to, must almost necessarily obscure, if they do not eventually pervert and stifle the truth.

"If judges should be corrupt, no dependence could be placed upon their decisions. If they were ignorant of the law, and their duty under it, or if they should act with reference to the views of any political party, little confidence could be entertained respecting the result of judicial investigations. Too great haste and impatience, even, on the part of the court, may result in giving false appearances to a case, and thus materially affect the verdict.

"If counsel, to whom the instituting and conducting of the case is necessarily intrusted, should so far forget their duty as to become participators in the suppression or manufacture of testimony — or brow-beat a witness, believed to be honest, for the purpose of making him say what he did not intend to say, or forbear saying what he was about to state, or otherwise pervert his testimony, with a view of

making truth appear as falsehood, or giving to falsehood the guise and garb of truth — or should they, by any underhand practices, at the trial, deceive or mislead the jury, as to the facts — or attempt to obtain a verdict against what was clearly the law and evidence of the case, by appeals to popular prejudice, or party feeling — all such attempts, if attended with any success, would add another to the means by which fraud and chicanery are sometimes enabled to triumph over justice.

"And should the jurors, to whom the case is eventually committed, instead of following out the evidence to its results, and founding their verdict upon the law and that part of the testimony which they conscientiously believe to be true, suffer themselves to be approached by the parties or their friends out of court, and listen to their representations, which must in most cases be partial, if not dishonest — or should they be swayed by passion or prejudice, or favor, to disregard the law, or evidence to which no exception could be taken — it is apparent that however honest and correct the witnesses might be — with whatever of integrity, intelligence and deliberation the case might be conducted by the court and counsel, no certain dependence could be placed upon the result.

"It is apparent, therefore, that most of the sources of the uncertainty which attends legal proceedings, are not properly chargeable upon the law as a subject of reproach, but are in some measure inseparable from the infirmities of human nature, and from the subjects which come under the cognizance of the tribunals of justice — and in some measure owing to frauds and imposition, which no system of laws, however well administered, can effectually prevent."

The concluding pages of the charge are devoted to a consideration of the moral duties of those engaged in the administration of the law, judges, attorneys, grand and petit jurors. These are elevated in their tone, and lucid and clear in their statements and expositions, and were their spirit universal, the rights of individuals would be far better protected, and the profession of the law rescued from the obloquy which rests upon it in the minds of the ignorant, the prejudiced and unreflecting.

Since reading this excellent charge, we have heard a rumor that Mr. Chief Justice Parker has resigned the place which he so ably fills upon the bench of New Hampshire, and has accepted the agency of one of the Lowell factories. If this be true, we are sorry for it. We are sorry that he has left a place which he has occupied with such ability and such usefulness, and condescended to assume a function so inferior in dignity and usefulness, however more lucrative it may be. We confess that we desire to see among the members of the bar and of the bench some sense of the dignity of their place and profession, and to have them governed by the feeling that to secure the largest possible income is not the chief end of man.

MEMOIRS OF THE RHODE ISLAND BAR. By WILKINS UPDIKE, Esq. Boston: Thomas H. Webb & Co., 1842.

In a former number of this magazine, we had occasion to speak in terms of praise of Mr. Washburn's Judicial History of Massachusetts; the appearance of the present volume leads us to hope and expect, that the example of collecting in an enduring form the materials for a future history of the American bar, may be followed in all of the states. We have read the work of Mr. Updike with great satisfaction. It is highly creditable to the industry of the author, and will be valuable to the student of history, as throwing much light upon the early politics of Rhode Island, and, indeed, of our whole country. At the same time, we think the author might have rendered his work more attractive, without detracting in the least from its merit for accuracy, by interspersing with more frequency and care, the various anecdotes of distinguished lawyers, which must still be extant, and by skilfully touching upon the peculiar characteristics of their minds, as exhibited on particular occasions. Mere facts are but the skeleton of biography, and need to be clothed with living flesh and blood by the historian, before they can become generally attractive. Those biographical works, which are mere records of facts and barren of all the genial impulses of feeling, as of the finer qualities of the intellect — wit,

humor, or imagination, — however valuable to the learned inquirer, are intolerably dull and unprofitable to the general reader.

The longest memoir in the present volume — that of James Mitchell Varnum — is highly interesting, and Mr. Updike's readers will fully agree with him, that General Varnum was one of the most able and eloquent advocates and profound statesmen of his day. His letter to John Innis Clarke, dated at Philadelphia, February 3, 1781, gives a faithful and vivid picture of the financial condition of the country, and clearly points out the inefficiency of the confederation, the necessity of an energetic constitution, and of a well-formed national bank, exposing with great ability the deplorable evils resulting from the paper money system. The letter of this great lawyer to his wife, announcing his critical situation and approaching death, is one of the most interesting and affecting compositions of the kind, that we recollect to have seen.

In the memoir of Jacob Campbell, it is related, that the lady to whom he was engaged to be married, after his death retired to her room and darkened it to her feelings, where she remained until her death. Such conduct Mr. Updike does not hesitate to condemn. "The suicidal course adopted by this young lady," he says, "upon this eventful occurrence, should not be allowed to pass without reproof. The dispensations of heaven, however severe, are to be met and borne with christian resignation. The infliction of self injury or immolation, proceeds upon a principle of retaliation or revenge, utterly at variance with every feature of the christian character."

It would be most unjust to leave an impression, that Mr. Updike's work is destitute of interest, although it must be confessed, that he constantly treats his subject with great gravity, as if he were conscious that he is conversing of the dead. Notwithstanding this sombre hue, however, there are some things in the work that would provoke a smile even in a church-yard. Conspicuous among these are sundry characteristic letters addressed to the author by the venerable Dr. Waterhouse, of Cambridge, which seem to be *de omnibus rebus, et quibusdam aliis* — from the philosophy of Locke and Bacon to the introduction of vaccination into the doctor's own family "from the very room and table where I am now sitting" — reminding the reader of the contents of the witches' cauldron in Macbeth.

> Eye of newt, and toe of frog,
> Wood of bat, and tongue of dog,
> Adder's fork, and blind worm's sting,
> Lizzard's leg, and owlet's wing.

For a pleasing variety in a small compass, witness the following paragraph from one of the worthy Doctor's epistles. "Of Henry Bull, I have heard many a pleasant anecdote from my father, and so also of William Ellery, both facetious characters. I have scattered hints of this sort to my worthy friend, the Rev. Mr. Elton, which he may use as he thinks fit. I suspect by your name, or rather *Opdyke*, that your ancestors were Dutch — the wisest people in Europe, in my opinion."

FORMS IN CHANCERY, ADMIRALTY, AND AT COMMON LAW; adapted to the Practice of the Federal and State Courts. By BENJAMIN L. OLIVER, Counsellor at Law. Boston: Charles C. Little and James Brown, 1842.

This is a new work by Mr. Oliver, partly intended as a supplement to his American Precedents. We do not doubt, that it furnishes some valuable precedents, because the files of our courts must contain many such. The part which we have most examined is the third part of the volume, containing select precedents in the district court of the United States, that is to say, precedents of admiralty pleadings; and this portion of the book we must criticise freely. We object to it, because the learned author has taken from the files, *verbatim et literatim*, to all appearance, the pleadings which he found there, and given them to the profession as models. Some of them may be models in truth. But precedents for admiralty

pleadings should not be thus prepared. It is a system of pleading in which redundancies and other faults are sure to be indulged in by general practitioners. These general faults have frequently met the animadversion of the courts; and in the appendix to Dunlap's admiralty practice, the example was well given, of taking the pleadings which had actually been drawn by practisers, pruning them of their redundancies, and reducing them to neat and accurate general forms. One of the consequences of printing from the files or records of a court, is the perpetuation of such errors as the following. On page 446, the *jurat* to a libel is certified as being "before me, T. G. C. *Jus. Pacis.*" This error escaped correction in the particular case, because the adversary did not take advantage of it; but it ought not therefore to creep into a book of precedents. It is well known that the *jurat*, to be used in courts of the United States, should be before a commissioner of those courts. On page 448, after the answer to the above libel, we have this statement. "This answer was sworn to, as the preceding libel, *before a justice of the peace.*" Now we happen to know, that the answer was *not* sworn to before a justice of the peace; but that it was sworn to before a gentleman who is a commissioner of the court and who certified as such. It may seem to be a captious criticism that points to such errors. But we shall be relieved of that charge, when it is considered, that any practitioner at a distance, who, with this guide before him, should send a libel or answer to be filed in court sworn to before a justice of the peace, would expose the oath of his client to be treated as no oath at all.

In the same part of the work, there are occasional notes of single decisions interspersed, upon the following principle, which we find in the preface. "In making a selection of what is introduced, regard has been had to practical utility alone. It has been taken for granted, that every one who has regularly studied his profession, is acquainted with certain general views, of which an occasional hint will serve to remind him, and prevent him from committing inadvertencies from want of consideration." We object to this way of making books. Instead of putting the student or the practiser upon inquiry among formal and professed treatises, as Mr. Oliver supposed it will, it only leads him to content himself with the "general views," which he finds stated in such notes of occasional decisions. If the subject be, as admiralty law is very likely to be, a new field to him, he will conclude that these general views are all the law there is upon the subject; and thus accurate and copious learning is discouraged, and thorough and comprehensive works are kept out of use.

Among these occasional notes of admiralty decisions, Mr. Oliver cites *Haggarty's* reports, so uniformly and in so many places, that it is clearly not an error of the press. Does this mean John Haggard, Esq. LL. D. now dwelling and practising at Doctor's Commons, the accomplished reporter of three volumes of admiralty decisions, including the last judgments of Lord Stowell, those of Sir Christopher Robinson, and Sir John Nicholl? *Haggarty*, indeed! If the cases and their names had not been familiar to us, we should not have known who the reporter might be.

THE HISTORY OF NEW HAMPSHIRE, from its Discovery, in 1614, to the Passage of the Toleration Act, in 1819. By GEORGE BARSTOW. Concord, N. H. Published by J. S. Boyd, June 4, 1842.

Works of general history hardly come within the legitimate range of our critical duties; but when a member of the bar, who is in the active practice of his profession, finds time to present to the public a work of merit like the one before us, we venture to take jurisdiction in the premises, and introduce his production to those of our readers who are not so fortunate as to have seen it. The task of writing the history of New Hampshire was a somewhat hazardous undertaking for a young man, especially as the field had already been occupied by one of the most philosophical of historians. But Mr. Barstow has produced a work of great merit, equally creditable, in our judgment, to himself, and to the state of which he is a

native. He appears to have gone over the whole subject with great care, giving ample evidence of industrious research, and his method of statement is clear and succinct. His style, manly and vigorous, is well suited to the dignity of his theme. The general tone of the history is in accordance with the well known political predilections of the author, and some of his readers may, in this, find matter of objection; but, in general, we believe the work will be regarded as the result of candid inquiry, conducted in good faith; and we are sure it will be pronounced by all who examine it, a most valuable contribution to the historical works of our country.

We notice a statement in relation to the famous Antinomian controversy of 1636, in Massachusetts, which, we believe, contains an error, although not of much consequence. The first synod ever convened in America, was occasioned by the religious dissentions of that period. Mr. Barstow (page 49) says; "the mountain of investigation gave birth to nothing. The synod found, that with all their theological acumen, they could discover no criminal difference between the dreaded Antinomian heresy maintained by Wheelwright and his sister, and the more orthodox tenets of Winthrop and Colton" [Cotton?] Now, in point of fact, this synod after a three weeks' discussion, did enumerate and condemn no less than eighty-two errors in the Antinomian faith, which are all set forth in Welde's Short Story, a very scarce work, which, we presume, Mr. Barstow had not seen. We notice, too, that he undertakes to point out the difference between the two parties, which then divided Massachusetts. But we are not altogether satisfied with his success. Indeed, it always seemed to us, that the difference was rather imaginary than real, having its origin in the peculiar character and situation of the colonists, and difficult to be appreciated at the present day. Of a certainty, the modern reader is lost in admiration at the incomprehensible jargon contained in the synod's exposition of the false doctrines, and strives in vain to ascertain the practical points of difference between the parties, sufficient to account for the extreme bitterness with which the controversy was conducted on both sides.

American Jurist and Law Magazine. Edited by L. S. Cushing and S. F. Dixon. October, 1842. Boston: Charles C. Little and James Brown.

We can do no more, this month, than give the contents of the Jurist, which are as follow: Art. 1. Definition and History of the Law of Nations; 2. Gerhard's Starkie on Evidence; 3. Life of Lord Eldon; 4. Mortgages of Rail Roads; 5. Progress of Penitentiary Improvement; Digest of Cases; Critical Notices; Quarterly List of New Publications.

BANKRUPTS IN MASSACHUSETTS.

The following list, continued from page 288, contains the names of petitioners in bankruptcy, in Massachusetts, from September 24 to October 20. On the last mentioned date, the whole number of petitions filed in that state was 1965.

Arnold, Anthony, Worcester.
Batchelder, James, Danvers.
Bartlett, Joseph M., Plymouth.
Bates, Albert, Weymouth.
Beals, Luke, Winchendon.
Billings, Hammatt, Boston.
Black, Paul B., Holden.
Bradford, John R., Boston.
Briggs, Daniel S., Berkley.
Buffum, William, Worcester.
Capron, Effingham L., Uxbridge.
Carroll, William, Beverly.
Carpenter, Joseph, Northbridge.
Carlton, Guy, Boston.
Chapin, Daniel E., Springfield.
Cheever, John, Wrentham.
Chisholm, John B., Salem.
Clark, John D., Boston.
Cummings, John, } Woburn.
Cummings, John, Jr. } compul'ry.
Curtis, Ocran, Lenox.
Cutler, John M., Springfield.
Daniels, Willard, Medway.
Darling, George, Boston.
Dexter, John B., Charlton.
Ward, Hammond, } Charlton.
Dodge, Rufus, }
Dorman, John P., Lowell.
Douglass, Barnabas N., Rochester.
Draper, James, Cambridge.
Draper, John C., Brookfield.
Eaton, Philip, Jr., Boston.
Elliot, Samuel, Boston.
Fales, Elisha F., Boston.
Farrar, Amos D., Holden.
Fenner, John S., Worcester.
Field, Daniel, North Bridgewater
Getchell, William, Boston.
Giles, John, Charlemont.
Glazier, Jotham, Roxbury.
Henry, Harry C., Boston.
Hibbard, Benjamin O., Boston.
Hobbs, John, Cambridge.

Hogins, Asa B., Boston.
Hollis, David, Lynn.
Horn, Charles F., Boston.
Houghton, Rufus, Northborough.
Howland, Christopher J., Boston.
Hunt, Samuel C., Charlestown

Johnson, Darius, Haverhill.
Johnson, Sidney, Braintree.
Joslyn, Anson J., Ware.

Kelley, Daniel, Jr., Lowell.
Kittredge, Charles, Billerica.
Knight, George, Boston.

Leland, James, Barre.

McIntyre, John, Boston.
Morey, John, Worcester.

Nash, Richmond, Abington.
Nye, David, Wareham.
Nye, George B., West Brookfield

Pearce, Nelson, Boston.
Pease, Joseph D., Charlton.
Perkins, Nathaniel, Salem.
Perry, Samuel H., New Bedford.
Phelps, Alvah, Foxborough.
Pickering, Loring, Boston.
Pray, Abram, Lynn.

Rappell, William H., Ipswich.
Roberts, George, Boston.
Sampson, Zabdiel S., N. Bedford.
Sever, Silas H., West Boylston.
Sibley, Chandler G., Greenwich.
Simpson, Ferdinand G., Hingham
Skinner, Benj. S., Ashburnham.
Smith, William, Lowell.
Stanwood, Theodore, Boston.
Stark, Nicholas, Edgartown.
Stearns, Otis, Holden.
Stearns, Oliver, Boston.

Tapley, Jesse, Lowell.
Tyler, James P., Lancaster.
Taylor, Henry, Boston.

Thompson, Jeremiah B., Charlestown.
Tolman, Elijah, Dorchester.
Torrey, Charles T., Boston.
Twitchell, Gershom, Leicester.
Tyler, Henry, Cheshire.

Walker, Nathan, Nantucket.
Wallis, Andrew, 2d, Beverly.
Warren, Thilman, Boston.
Ward, Hammond, } Charlton.
Dodge, Rufus, }
Waters, Reuben, Sutton.
Watson, Horace C. } Lancaster.
Washburn, Delphos, } compulsory
Wentworth, Martin } Bridgewa-
Wentworth, Loranus } ter.
Wheeler, Josiah, Lynn.
Wild, Ludovicus, Randolph.
Williams, Horatio, Boston.
Williams, Benj. F., Williamsburg
Wood, Joel S., Heath.
Wyman, John R., Lancaster.

BANKRUPTS IN NEW YORK.

The following list, continued from page 288, contains the names of petitioners in bankruptcy, in the southern district of New York, from September 20 to October 18.

Adams, Nillioues, Saugerties.
Adriance, John F. New York.
Andariese, Wm. E. New York.
Austin, Lewis C. New York.

Baldwin, Francis, New York, (compulsory.)
Bancroft, Monson, New York.
Barclay, Ames, New York.
Bates, Barnabas, New York.
Berry, Evander, Williamsburgh.
Bolen, Daniel M., New York, (compulsory.)
Brown, Burlin, New Nork.
Bruce, Nathaniel, Hurley.
Bugbee, Ira D., New York.
Burnett, Ward B., New York.

Carpenter, Charles D., N. York.
Chamberlin, Amos S., New York.
Chamberlin, Theodore, N. York.
Colwell, Israel D., Jamaica.
Cooke, James F., New York.
Coleman, George, New York.
Colman, Samuel, Brooklyn.
Cummings, Abraham, New York.
Cruger, William E., Brooklyn.

Dexter, Henry H., New York.
Douglas, James, Hunter,
Dickinson, Henry W., New Baltimore.
Dibble, Oscar J. H., Savannah, Ga., firm of Pulaski, Jacks, & Co., New York, (compulsory.)

Eno, Rufus, Pine Plains.
Everson, John David, N. York.

Fitch, Thomas, New York.

Gibbons, James S., New York.
Gillespie, John E., Castleton.
Griffith, John M., Brooklyn.
Graham, George, New York.

House, Samuel A., Brooklyn, (compulsory.)
Hanford, Ebenezer, Jr., Williamsburgh.
Harris, Nathaniel, Bedford.
Hixon, Joseph S., New York.
Hull, John W., New York, (compulsory.)

Isham, Ralph H., Brooklyn.

Jacks, Pulaski, New York, (compulsory.)
Joseph, John, New York.
Jung, Theobald C., Brooklyn.

Kluaberg, Carl, New York.

Laflin, Winthrop, Saugerties.
Loundsbury, Samuel, New York.

Merritt, Daniel B., New York, (compulsory.)
Mahoney, James, New York.
Mayhew, George A., New York.
Marshall, John E., New York.
Marshall, Joseph H., New York.
Mason, Charles, New York.
Marks, William, New York.
Mead, Gideon, New York.
Miler, James E., New York, (compulsory.)
Mott, Jacob H., New York.
Morgan, Henry E., New York.
Mott, Jordan, New York.
Munroe, Edmund S., Brookline.
Mullen, Thomas, New York.

Northam, Edward F., New York.

Palmer, George, New York.
Parks, John, New York, (compulsory.)
Parker, John A., New York.
Peck, William B., New York.

Post, Joel B., New York.
Pratt, George W., Newburgh.

Reeve, Samuel, New York.
Richards, John H., New York.
Robinson, Benjamin F., N. York.
Rogers, John L., New York.

Salter, Benjamin, New York.
Saunders, Uriah, Kingston.
Scott, William, New York.
Sherwood, Benjamin, New York.
Sleight, Henry C., Pleasant Valley.
Smith, Abraham H., New York, (compulsory.)
Spencer, William H., Athens.
Starr, George, New York.
Stevens, Nathan, Brooklyn.
Suydam, James, New York.

Tanner, Thomas R., New York.
Tompkins, Ambrose, Haverstraw.
Townsend, Eleazer M., N. York.
Trott, John S., Williamsburgh.
Tyson, John, New York.

Van Hoesen, Peter H., Catskill.
Van Pelt, Tunis, Southfield.
Voorhies, Robert C., New York.

Wakeley, Hazelton, New York.
Wales, Samuel R., New York.
Wallace, John H., New York.
Waterhouse, John H., New York, (compulsory.)
Weeks, Horace, New York.
Westlake, Richard, New York.
Winn, Isaac W., New York.
Williston, Othniel H., N. York.
Woram, William, } N. York.
Haughtwout, Eder V. } Copart's.
Wood, Ira, Goshen, (compuls'y.)
Yoe, Peter L., Mount Pleasant.